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PRIVATE INTERNATIONAL LAW

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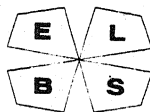
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PREFACE TO THE SIXTH EDITION

THE periodic revision of this book has always been a somewhat humiliating experience. At the outset the task has seemed comparatively simple. The current edition has not been too roughly handled by the reviewers, it is still in circulation, and presumably all that is required is to bring it up to date by the addition of recent authorities and by suggesting possible interpretations of such statutes as may have been passed. But this complacency quickly evaporates when the book is read afresh, for shortcomings of one kind and another are not long in coming to light and the impression gradually grows that slight amendments and additions will not suffice. Such, indeed, has proved to be the case on the present occasion and in the result few pages have survived alteration. In case it may be of use to those who are familiar with the book, the following are examples of where the text has been materially affected.

Sovereign immunity (pp. 88-102).

Jurisdiction of the English courts. Here, the former pages, 104-13, dealing with jurisdiction *ratione personae*, have been entirely rewritten and replaced by pages 107-11. Later in the same chapter an attempt has been made to show that a defendant is not amenable to this jurisdiction merely because movables belonging to him are situated in England (pp. 120-2).

It has been necessary to expose the heresy, surprisingly held in certain quarters, that to settle permanently in a new country does not effect a change of domicile if the *propositus* intends to retain his former personal law (p. 180).

The litigation concerning the National Bank of Greece and Athens has, rightly or wrongly, been considered in connexion with corporations (pp. 207-9).

The discussion of the *Taczanowska* and *Kochanski* decisions, vivid illustrations of the lamentable truth that hard cases make bad law, has increased the text by three pages (pp. 344-6).

The question, hitherto negatively answered in ten lines, whether the bare fact that the parties married in England suffices to give the court jurisdiction to annul a voidable marriage, has required more copious treatment (pp. 362-6).

The doctrine of *Travers v. Holley* (pp. 397-400, 652-3).

The fact, formerly denied, that a decree of judicial separation affects the status of the parties, has involved a fuller account of this topic (pp. 408-14).

Owing to the acceptance by English law of the doctrine of the putative marriage, the chapter on legitimacy and legitimation has been rewritten (pp. 415-39).

The subject of adoption is now treated separately and with more emphasis upon a criticism of the few relevant decisions (pp. 439-46).

Four statutes, having a direct or indirect bearing upon the subject of this book, have been passed since the last edition—the Mental Health Act, 1959; the Legitimacy Act, 1959; the Marriage (Enabling) Act, 1960; and the Charities Act, 1960. A certain obscurity in the Legitimacy Act has proved a little troublesome, but the Mental Health Act, which abolishes much of the old law, has caused me no anxiety, for no less a person than the Master of the Court of Protection himself, Mr. Raymond Jennings, Q.C., has provided me with an account of such of the statutory alterations as affect private international law. Help of this inestimable value is what every distracted author longs for, and I am sincerely grateful to my distinguished friend for having ensured that on this occasion the longing has proved to be more than a beautiful dream.

My burdens have been further lightened by the expert help given to me by Mr. P. B. Carter, B.C.L., of Wadham College, Oxford, who unhesitatingly accepted my somewhat extravagant request that he should read the amended manuscript before it reached the printer. In the course of this tedious and exacting task he has revealed and corrected many deficiencies and on more than one occasion, as for example, in the case of capacity to acquire a domicile, has convinced me that I had completely missed the point. To give thanks to him is no doubt good, but yet a wholly inadequate return for what he has done.

I express my gratitude for the encouragement and assistance given to me by the publishing and printing staffs of the Clarendon Press.

My endeavour has been to state the law as it was on 1 January 1961.

G. C. C.

29 March 1961

PREFACE TO THE FIRST EDITION

CONVENTION demands that in the preface to a new book the author should excuse his temerity in adding to the literature on the subject and should also state the objects he hopes to attain. My excuse is the fascination, perhaps my readers will say the fatal fascination, of the subject. Of all the departments of English law, Private International Law offers the freest scope to the mere jurist. It is the perfect antithesis of such a topic as real property law. It is not overloaded with detailed rules, it has been only lightly touched by the paralysing hand of the Parliamentary draftsman, it is perhaps the one considerable department in which the formation of a coherent body of law is in course of process, it is, at the moment, fluid not static, elusive not obvious, it repels any tendency to dogmatism, and, above all, the possible permutations of the questions that it raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes. Despite its value as a subject of academic study it is curiously neglected in the legal education of this country, a fact which is remarkable if regard is had to the number of different legal systems that the British Empire comprises. On the Continent and in the United States of America, Private International Law is one of the major subjects of study at the Universities, but in England it cannot claim a professorship of its own and it forms only an insignificant part of the chief law examinations.

The purpose of this book, however, is not merely to indulge my own fancy, but to provide students with a shorter account of the subject than most of those already published. Further, my object has been, not to remain satisfied with mere exposition but to approach the more controversial topics in a spirit of constructive criticism. There are many instances in which I have found it impossible to agree with the views of such great masters as Dicey and Westlake, and in which I have ventured, perhaps rashly, to suggest that the relevant authorities indicate a somewhat different principle, but in all such cases I have been careful to present the reader with what may be called the generally accepted textbook view of each matter. Some of the mild strictures contained in this book may not be well founded, but even so they can do little harm, for there is no doubt that

the subject in general sorely needs criticism. It may be doubted, indeed, whether all is well with the English system of Private International Law. Instances are numerous in the last thirty years in which the Courts have adopted some plausible principle, without serious investigation of its merits and without considering what the effect will be if it is applied to a case with slightly different facts. There are other cases in which it is difficult to extract the *ratio decidendi*, or indeed any clear principle, from the judgments. Private International Law, in fact, presents a golden opportunity, perhaps the last opportunity, for the judiciary to show that a homogeneous and scientifically constructed body of law, suitable to the changing needs of society, can be evolved without the aid of the legislature, and, though the task must necessarily be performed by the judges, there seems no reason why the jurist should stand aside in cloistered inactivity.

The book contains no account of the law relating to British nationality. This is a subject which should be dealt with solely in works on Constitutional Law, for it clearly has little, if any, connexion with Private International Law. Whether a person is a national of a particular country is relevant, neither to the question of choice of law, nor, it is submitted, for purposes of jurisdiction.

It is with a genuine appreciation of the value of the help afforded to me that I record my thanks to several colleagues and friends. Mr. B. A. Wortley, LL.M., Reader in Law, Birmingham University, has unstintingly placed his knowledge and leisure at my disposal. He has read the text in typescript, and has not only demonstrated inaccuracies and inconsistencies but has made many constructive suggestions that I have incorporated in the book to its improvement. It must not, however, be taken that the text represents his views in every particular, for there are several matters upon which he would adopt sometimes a bolder, sometimes a more cautious, attitude. Advice of inestimable value has been given to me by Mr. W. E. Beckett, C.M.G., of the Foreign Office. He has read the part of the book that deals with Family Law, and it is due to his sagacity and learning that I have avoided some of the mistakes which it is so easy to commit in connexion with the law of husband and wife. Moreover, he has introduced me to several decisions and authorities of which I was ignorant. Mr. J. G. Foster, Fellow of All Souls, and All Souls Lecturer in Private International Law, with great self-sacrifice, has made time in

the midst of a busy life to read the proofs of the book. Not a few amendments are due to his acumen and insight.

I express my gratitude to Dr. A. Mendelssohn-Bartholdy of Balliol College, to Dr. Magdalene Schoch of Hamburg University, and to Dr. C. Grassetti of Milan University, who have given me information upon certain aspects of Continental law; and also to Dr. R. W. Lee, Fellow of All Souls and Rhodes Professor of Roman-Dutch Law, and to Mr. A. Suzman of the South African Bar, who have aided me with their counsel upon certain parts of the book. Finally, I gratefully acknowledge the help afforded to me by the staff of the Clarendon Press.

G. C. C.

Oxford

1 January 1935

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SOME ABBREVIATIONS USED IN THIS BOOK

- Amos and Walton = *Introduction to French Law*, by Sir M. S. Amos and F. P. Walton (1935).
- Arminjon = *Précis de droit international privé*, par P. Arminjon, 3^{ème} éd. (1947-52).
- A.L.J. = *Australian Law Journal*.
- Bar = *International Law, Private and Criminal*, by Ludwig von Bar, translated into English by G. R. Gillespie, 2nd ed. (1892).
- Bate = *Notes on the Doctrine of Renvoi*, by John Pawley Bate (1904).
- Batiffol = *Traité élémentaire de droit international privé*, 3rd ed. (1959).
- Baty = *Polarized Law*, by T. Baty (1914).
- Beale = *Cases on the Conflict of Laws*, by Joseph Henry Beale, 2nd ed. (1928).
- Beale on the Conflict of Laws = *The Conflict of Laws*, by J. H. Beale (1935).
- Breslauer = *Private International Law of Succession*, by W. Breslauer (1937).
- Burge = *Commentaries on Colonial and Foreign Laws*, by W. Burge, new ed. (1907-28).
- B.Y.B.I.L. = *British Year Book of International Law*.
- Byles = *Treatise on the Law of Bills of Exchange*, by Sir J. B. Byles, 19th ed. (1931).
- Cheatham = *Cases and Materials on Conflict of Laws*, by E. E. Cheatham, H. F. Goodrich, E. N. Griswold, and W. L. M. Reese, 3rd ed. (1951).
- Clunet = *Journal de droit international privé*.
- Coleman Phillipson = *The International Law and Custom of Ancient Greece and Rome*, by Coleman Phillipson (1911).
- Cook = *Logical and Legal Bases of the Conflict of Laws*, by W. W. Cook (1942).
- Dicey = *A Digest of the Laws of England with reference to the Conflict of Laws*, by J. H. C. Morris and others, 7th ed. (1958).
- D.L.R. = *Dominion Law Reports*.
- Duncan and Dykes = *The Principles of Civil Jurisdiction as applied in the Laws of Scotland*, by George Duncan and D. Oswald Dykes (1911).
- Falconbridge = *Conflict of Laws*, by J. D. Falconbridge, 2nd ed. (1954).
- Farnsworth = *The Residence and Domicil of Corporations*, by A. Farnsworth (1939).
- Foote = *A Concise Treatise on Private International Law*, by John Alderson Foote, 5th ed. by Hugh L. Bellot (1925).
- Frederic Harrison = *On Jurisprudence and the Conflict of Laws*, by Frederic Harrison (1919).
- Goodrich = *Handbook on the Conflict of Laws*, by H. F. Goodrich, 3rd ed. (1949).
- Graveson = *The Conflict of Laws*, 4th ed. 1960.
- Grotius Society = *Transactions of the Grotius Society*.
- Hancock = *Torts in the Conflict of Laws*, by M. Hancock (1942).
- Hawkins = *A Concise Treatise on the Construction of Wills*, by F. V. Hawkins, 3rd ed. by C. P. Sanger (1925).
- H.L.R. = *Harvard Law Review*.

- I. & C.L.Q. = *International and Comparative Law Quarterly*.
 I.L.Q. = *International Law Quarterly*.
- Jarman = *A Treatise on Wills*, by J. Jarman, 7th ed. (1950).
 Jo. Comp. Law = *Journal of Comparative Legislation and International Law*.
 Johnson = *Conflict of Laws*, by W. S. Johnson (1933-7).
- Kahn-Freund = *The Growth of Internationalism in English Private International Law*, by O. Kahn-Freund.
- Kuhn = *Comparative Commentaries on Private International Law*, by A. K. Kuhn (1937).
- Lalive = *The Transfer of Chattels in the Conflict of Laws*, by Pierre A. Lalive (1955).
- Laurent = *Droit civil international*, par F. Laurent (1880-1).
 Lorenzen = *Cases on the Conflict of Laws*, by Ernest G. Lorenzen, 5th ed. (1946).
- L.Q.R. = *Law Quarterly Review*.
- Mann = *The Legal Aspect of Money*, by F. A. Mann, 2nd ed. (1953).
 Mendelssohn-Bartholdy = *Renvoi in Modern English Law*, by A. Mendelssohn-Bartholdy (1937).
 M.L.R. = *Modern Law Review*.
 Morris = *Cases on Private International Law*, by J. H. C. Morris, 3rd ed. (1960).
- Nelson = *Selected Cases, Statutes, and Orders illustrative of the Principles of Private International Law*, by H. B. Nelson (1889).
 Niboyet = *Manuel de droit international privé*, par J. P. Niboyet (1928).
 Nussbaum = *Principles of Private International Law*, by A. Nussbaum (1943).
- Paton = *A Text-Book of Jurisprudence*, by G. W. Paton, 2nd ed. (1951).
 Phillimore = *Commentaries on Private International Law or Comity*, vol. iv, by Sir Robert Phillimore, 3rd ed. (1889).
 Piggott = *Foreign Judgments and Parties out of the Jurisdiction*, by Sir Francis Piggott, 3rd ed. (1908-10).
- Rabel = *The Conflict of Laws: A Comparative Study* (vol. 1, 1945; 2, 1947; 3, 1950), by Ernst Rabel.
- Read = *Recognition and Enforcement of Foreign Judgments*, by H. E. Read (1938).
- Robertson = *Characterization in the Conflict of Laws*, by A. H. Robertson (1940).
- Sack = 'Conflict of Laws in the History of English Law', by Alexander N. Sack, in vol. iii of *Law: A Century of Progress* (1937).
- Savigny = *A Treatise on the Conflict of Laws*, by Friedrich Carl von Savigny, translated into English by W. Guthrie. (All references are to the first edition, published in 1869.)
- Schmithoff = *A Textbook of the English Conflict of Laws*, by C. M. Schmithoff, 3rd ed. (1954).
 = *Smith's Leading Cases*, 13th ed. (1929).
 = *Commentaries on the Conflict of Laws*, by Joseph Story, 8th ed. by G. Melville Bigelow (1883).
- S.L.C. = *Principles of Conflict of Laws*, by G. W. Stumberg (1937).
 Story = *Cours élémentaire de droit international privé*, par F. Surville, 7ème éd. (1925-9).
 Stumberg = *A Treatise on the Construction of Wills*, by H. S. Theobald, 11th ed. by J. H. C. Morris.
- Surville
- Theobald

ABBREVIATIONS

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- Valery = *Manuel de droit international privé*, par Jules Valery (1914).
- Webb and Brown = *A Casebook on the Conflict of Laws*, by P. R. H. Webb and D. J. L. Brown.
- Weiss = *Manuel de droit international privé*, par André Weiss (1920).
- Westlake = *A Treatise on Private International Law*, by John Westlake, 7th ed. by Norman Bentwich (1925).
- Wharton = *A Treatise on the Conflict of Laws*, by Francis Wharton, 3rd ed. by George H. Parmele (1905).
- White and Tudor = *White and Tudor's Leading Cases in Equity*, 9th ed. (1928).
- Wolff = *Private International Law*, 2nd ed. (1950).
- Y.L.J.* = *Yale Law Journal*.

PART I

INTRODUCTION

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CHAPTER II. HISTORICAL ANTECEDENTS

CHAPTER III. THE CONSECUTIVE STAGES IN AN
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CHAPTER IV. GENERAL PRINCIPLES RELATING TO
JURISDICTION

CHAPTER I

DEFINITION, NATURE AND SCOPE OF PRIVATE INTERNATIONAL LAW

THAT part of English law known as Private International Law comes into operation whenever the court is seised of a suit that contains a foreign element. It functions only when this element is present, and its objects are threefold. Function of private international law

- ✓ First, to prescribe the conditions under which the court is competent to entertain such a suit.
- ✓ Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained.
- ✓ Thirdly, to specify the circumstances in which (a) a foreign judgment can be recognized as decisive of the question in dispute; and (b) the right vested in the creditor by a foreign judgment can be enforced by action in England.

Private international law owes its existence to the fact that there are in the world a number of separate municipal systems of law—a number of separate legal units—that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. The occasions are frequent when the courts in one country must take account of some rule of law that obtains in another. A sovereign is supreme within his own territory, and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over everybody and everything within that territory and over every transaction that is there effected. He can, if he chooses, refuse to consider any law but his own. The adoption, however, of this policy of indifference, though common enough in other ages, is impracticable in the modern civilized world, and nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be at variance with their own territorial or internal system of law. Moreover, as will be shown later, it is no derogation of sovereignty to take account of foreign law. Recognition of foreign laws

- ✓ The recognition of a foreign law in a case containing a foreign element may be necessary for at least two reasons. Recognition necessary for two reasons:
- i.e. the local law of the place where the court is situate, would (1) To avoid injustice

often lead to gross injustice. To take an example given by Frederic Harrison,¹ suppose that a person engaged in English litigation is required to prove that he is the lawful son of his parents, who were married abroad many years ago. The marriage ceremony, though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of English law, but nevertheless, to apply the English Marriage Act to such a union, and thereby to deny that the parents were man and wife, would be nothing but a travesty of justice.

(2) To
determine
the rights
of the
parties

Secondly, if the court is to carry out in a rational manner the policy to which it is now committed—that of entertaining actions in respect of foreign claims—it must in the nature of things take account of the relevant foreign law or laws. A plaintiff, for instance, claims damages for breach of a contract that was made and was to be performed in France. Under the existing practice the court is prepared to create and to enforce in his favour, if he substantiates his case, an English right corresponding as nearly as possible to that which he claims, but obviously neither the nature nor the extent of the relief to which he is rightly entitled, nor, indeed, whether he is entitled to any relief, can be determined if the law of France is disregarded. To consider only English law might well be to reverse the legal obligations of the parties as fixed by the law to which their transaction, both in fact and by intention, was originally subjected. A promise, for instance, made by an Englishman in Italy and to be performed there, if valid and enforceable by Italian law, would not be held void by an English court merely because it was unsupported by consideration.

As Bigelow has well said:²

‘If in a case before an American court the rights of the parties depend upon a transaction which took place in France, and the transaction is of a kind concerning which the French law and that of the American court are different, the question arises whether the transaction is governed by French law or not. If the court decides that it is governed by French law, then it is bound to apply that law in determining the rights of the parties, not from courtesy or politeness to France, but because justice requires it. The rights of the parties depend partly upon the circumstances of the transaction and partly upon the law which gave the transaction its force and effect. It would be as unjust to apply a different law as it would be to determine the rights of the

¹ *Jurisprudence and the Conflict of Laws*, p. 99. Graveson, op. cit., p. 6.

² In a note to the 8th ed. of Story, p. 38.

parties by a different transaction. In applying the French law, the court does not allow it to operate in America, but only recognizes the fact that it did operate in France.'

In justifying this reference to a foreign law, judges and textbook writers, following the theory of the great Dutch jurist, John Voet, have frequently used the term 'comity'. The term is, indeed, frequently found in English writings and judgments, but on analysis it will be found to be either meaningless or misleading. The word itself, indeed, is incompatible with the judicial function, for, as Livermore remarked over a century ago, comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties.¹ Again, if the word is given its normal meaning of courtesy it is scarcely consonant with the readiness of English courts to apply enemy law in time of war. Moreover, if courtesy formed the basis of private international law a judge might feel compelled to ignore the law of Utopia upon proof that Utopian courts apply no law but their own. If, on the other hand, comity means that no foreign law is applicable in England except with the permission of the sovereign, it is nothing more than a truism. The fact is, of course, that the application of a foreign law implies no act of courtesy, no sacrifice of sovereignty. It merely derives from a desire to do justice. As a French jurist has remarked:

Comity not
the basis of
private in-
ternational
law

'When in a given case French law declares a foreign law applicable, it does this because it follows the system of conflict of laws which seems best and because French law thinks that the legal situation under consideration should be governed by the foreign law. . . . French law clearly withdraws because of its own decision, for French law under normal circumstances is always applicable in France. French law does not withdraw to make a sacrifice, but in order to administer the best justice, because in the hypothesis under consideration, the preferable solution consists in the application of a rule of foreign law.'²

Private international law, then, is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. It has, accordingly, been described as meaning 'the rules

Private in-
ternational
law exists
for cases
contain-
ing some
foreign
element

¹ Nadelmann, *Festgabe für Max Gutzwiller* (1959), p. 270.

² M. Ancel in *Travaux de la Commission de Réforme du Code Civil* (1951), p. 578; cited and translated *American Journal of Comparative Law* (1952), p. 412. For fuller discussions see Wolff, pp. 14-15; Beale, pp. 1964-5; Foster, *La Théorie anglaise du droit international privé*, pp. 1 et seq. (Recueil des Cours, 1939).

voluntarily chosen by a given State for the decision of cases which have a foreign complexion'.¹ The legal systems of the world consist of a variety of territorial systems, each dealing with the same phenomena of life—birth, marriage, death, divorce, bankruptcy, contracts, wills and so on—but in most cases dealing with them differently. The moment that a case is seen to be affected by a foreign element, the court must look beyond its own internal law, lest the relevant rule of the internal system to which the case most appropriately belongs should happen to be in conflict with that of the *forum*.² The forms in which this foreign element may appear are numerous. One of the parties may be foreign by nationality or may have a foreign domicile; a trader may be adjudicated bankrupt in England, having numerous creditors abroad; the action may concern property situated abroad or a disposition made abroad of property situated in England; if the action is on a bill of exchange, the foreign element may consist in the fact that the drawing or acceptance or indorsement was made abroad; a contract may have been made in one country to be performed in another; two persons may resort to the courts of a foreign country where the means of contracting or of dissolving a marriage are more convenient than in the country of their domicile.

Examples
of foreign
elements

Meaning of
the state-
ment that
private in-
ternational
law fixes
the area of
a law's
authority

It is frequently stressed that the function of private international law is to indicate the area over which a rule of law extends—that it 'deals primarily with the application of laws in space'.³ The purport of this is that a rule of substantive law, e.g. the English rule that every simple contract must be supported by consideration, is generally expressed in universal terms and *proprio motu* has no dimension in space, for according to its wording it applies to all contracts wherever made. But its dimension in space, i.e. its sphere of authority, is the very thing that is fixed by private international law, for a sovereign is free to provide, if he chooses, that the area over which a rule of substantive law, whether domestic or foreign, is to prevail shall be wider than the territorial jurisdiction in which it originated. If, for instance, an English court decides that the goods situated in England belonging to a man who died intestate and domiciled in France shall be distributed according

¹ Baty, *Polarized Law*, p. 148.

² A convenient classification of law is into I. Public International Law; II. Municipal Law: (a) Internal Law, (b) Private International Law.

³ Beale, p. 1; see especially, Unger, 43 *Transactions of the Grotius Society*, pp. 94 et seqq.

to the provisions of the Code Napoléon, what it decides in effect is that the rule of the French internal law relating to intestacy is, in the case of persons domiciled in France, effective outside the territorial limits of the French law-maker. In the words of Savigny:

'It is this diversity of positive laws which makes it necessary to mark off for each, in sharp outline, the area of its authority, to fix the limits of different positive laws in respect to one another.'¹

This method of expressing the function of the subject does not mean that the sphere of application of each rule of law is, or can be, determined once and for all for every situation to which it may be relevant.² The area over which any given rule of law extends will vary with the particular circumstances in which its operation is under consideration. The English rules governing contractual capacity will apply to certain transactions effected by domiciled Englishmen abroad, but not to others.

Private international law is not a separate branch of law in the same sense as, say, the law of contract or of bankruptcy. It is all-pervading.

Private international law deals with three questions:

'It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case, or a matter of criminal procedure. . . . The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by private international law.'³

Nevertheless, private international law is a separate and distinct unit in the English legal system just as much as the law of bankruptcy or of contracts, but it possesses this unity, not because it deals with one particular topic, but because it is always concerned with one or more of three questions, namely:

- (i) Jurisdiction of the English court.
- (ii) The choice of law.
- (iii) Jurisdiction of a foreign court.

We must be prepared to consider almost every branch of private law, but only in connexion with two matters—jurisdiction and choice of law.

¹ *Private International Law*, Guthrie's translation, p. 6.

² Cook, *Logical and Legal Bases of Conflict of Laws*, p. 7.

³ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, p. 101.

(i) The question of jurisdiction. The rule at common law is that the English court has no jurisdiction to entertain an action unless the defendant has been personally served with a writ of summons in England or Wales. This rule, which cannot be satisfied while the defendant is abroad, applies of course whether the case has a foreign complexion or not, but there are two reasons which require the question of jurisdiction to be separately treated in a book on private international law.

First, there are certain circumstances in which the court is empowered by statute to assume jurisdiction over absent defendants, a power which naturally is of greater significance in foreign than in domestic cases.¹

Secondly, there are certain types of action, such as a petition for divorce, where the mere presence of the defendant in the country does not render the court jurisdictionally competent.²

The question of jurisdiction, moreover, is not always confined to the competence of the English court. If an action is brought in England upon a judgment that has been delivered abroad, or if it is claimed that the issue is *res judicata* because of a foreign judgment, the first duty of the English court is to decide whether the foreign court was competent to pass judgment, i.e. whether it had jurisdiction according to the principles of English private international law to adjudicate upon the case.

(ii) The question of choice of law. If the court decides that it possesses jurisdiction, then the next question, as to the choice of law, must be considered, i.e. which system of law, English or foreign, must govern the case? The action before the English court, for instance, may concern a contract made or a tort committed abroad, the validity of a will made by a person who died domiciled abroad, or the effect of a decree of divorce obtained in a foreign country. In each case that part of English law which consists of private international law directs what legal system shall apply to the case, i.e., to use a convenient expression, what system of internal law shall constitute the *lex causae*. English private international law, for instance, requires that the movable property of a British subject who dies intestate domiciled in Italy shall be distributed according to Italian law. Again, if two parties who were married in France become domiciled in Germany, where their marriage is annulled for a reason that would not have been sufficient in France, private international law directs that whether the annulment is effective shall be determined by German law.

¹ *Infra*, pp. 111 et seqq.

² *Infra*, pp. 109, 408.

These rules for the choice of law, then, or *règles de rattachement* as they are called by French jurists, indicate the particular legal system by reference to which a solution of the dispute must be reached. This does not necessarily mean that only one legal system is applicable, for different aspects of a case may be governed by different laws. In fact it has been said that a case containing foreign elements is never subjected to one legal system.

'A foreign marriage is regulated as regards formal validity by the law of the place of celebration, as regards capacity to marry by the laws of the domicils of the parties. A substantial control is moreover exercised by the law of the *forum*, so that in every case at least two—the *lex fori* and one or more foreign systems—apply to different aspects of the case.'¹

It must be observed that the function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and it has been said by a French writer that this department of law resembles the inquiry office at a railway station where a passenger may learn the platform at which his train starts. If, for instance, the defence to an action for breach of contract made in France is that the formalities required by French law have not been observed, private international law ordains that the formal validity of the contract shall be determined by French law. But it says no more. The French law relating to formal validity must then be proved by a witness expert in the subject.

It is generally said that the judge at the *forum* 'applies' or 'enforces' the chosen law, or alternatively that the case is 'governed' by the foreign law. These expressions are convenient to describe loosely what happens, but they are not accurate. Neither is it strictly accurate to say that the judge enforces, not the foreign law, but a right acquired under the foreign law.² The only law applied by the judge is the *lex fori*, the only rights enforced by him are those created by the *lex fori*. But owing to the foreign element in the case the foreign law is a fact that must be taken into consideration, and what the judge attempts to do is to create and to enforce a right as nearly as possible similar to that which would have been created by the foreign court had it been seised of a similar case purely domestic in character.³

Private international law does not solve a case

Meaning of 'application' of foreign law

¹ Unger, 19 *Bell Yard*, 17.

² *In re Askew*, [1930] 2 Ch. 259, 267.

³ *Infra*, p. 34; and see Lorenzen in 20 *Columbia Law Review*, 259.

Meaning
of 'foreign
law'

For the purposes of private international law the expression 'foreign system of law' means any system prevailing in a geographical area outside the sphere of operation of the *lex fori*. It therefore includes, not merely the law existing in a State under a foreign political sovereignty, but also the law prevailing in a subdivision of the political State of which the *forum* is part. Thus, for the purpose of private international law and so far as English courts are concerned, the law of Scotland, of the Channel Isles, of Northern Ireland, of one of the Dominions or of a British Colony is just as much a foreign law as the law of Italy or Portugal.¹

Private in-
ternational
law is
different
in each
country

Private international law is not the same in all countries. There is no one system that can claim universal recognition, and this book is concerned solely with that which obtains in England, that is to say, with the rules that guide an English court whenever it is seised of a case that contains some foreign element. A writer on public international law may perhaps claim with some justification that the doctrines which he propounds are entitled to universal recognition. Thus, in theory at any rate, a German and a French jurist should agree as to what constitutes an effective blockade. But he who writes on private international law can make no such claim. This branch of law as found, for instance, in France shows many striking contrasts with its English counterpart, and though the English and North American rules show considerable similarity they are fundamentally different on a number of points. In England, for instance, the essential validity of a contract is determined by that system of law with which the contract has the closest connexion, but in the United States it is governed in some States by the law of the place where the contract was made, in others by the law of the place of performance. The many questions relating to the personal status of a party depend in England and North America upon the law of his domicile, but in France, Italy, Spain and most of the other European countries upon the law of his nationality. Again, so conflicting are the principles applied by the various systems of jurisprudence to divorce jurisdiction, that the same two persons are frequently deemed married in one jurisdiction but unmarried in another. On the other hand, though Scottish internal law differs radically from that of England, yet the principles of private international law are so similar in both countries that an English decision is usually, though not invariably, followed in Scotland.

¹ For a different view held in Russia see 4 *I. & C.L.Q.*, p. 387.

There are two possible ways in which this lack of unanimity among the various systems of private international law may be ameliorated. Methods of avoiding conflicts of laws ✓

The first is to secure by international conventions the unification of the *internal* laws of the various countries upon as many legal topics as possible. When attention is paid to the fundamental and basic differences in principle that distinguish one legal system from another, especially in the Anglo-Saxon systems as contrasted with their Continental counterparts, and when due regard is had to the modern enthusiasm for nationalism and to the recent outbreak of racialism, it is obvious that this form of unification holds out no great prospect of success. Nevertheless, a certain amount of progress has been made in the few departments of law where this unity is imperative and possible. Unification of internal laws (i). ✓

An important example of unification is the Warsaw Convention of 1929 which makes the international carriage of persons or goods by aircraft for reward subject to uniform rules as regards both jurisdiction and the law to be applied, and provides that any agreement by the parties purporting to alter the rules on these matters shall be null and void. The Convention has been made binding in England by the Carriage by Air Act, 1932.¹ Another example of the unification of internal laws is the Carriage of Goods by Sea Act, 1924, which has adopted for England, in common with many other nations, certain rules relating to sea transit that were formulated by the International Conference on Maritime law held at Brussels in 1922 and 1923. Again, an extensive unification of the law concerning carriage by rail was accomplished by the Berne Convention of 1952, which was ratified by the United Kingdom in 1954.² A more ambitious scheme and one of greater importance to the mercantile community is the attempt to unify the law of bills of exchange and cheques, and also the law of sale. The Geneva Conference of 1930, attended by representatives from thirty-two countries, resulted in a convention, signed by twenty-two countries, which formulated the Uniform Law of Bills of Exchange.³ Great Britain signed only a convention on stamp duties, but the importance of the unification from the British point of view is that in future the English lawyer or man of Laws of international air carriage unified
Other unifying attempts

¹ 22 & 23 Geo. V, c. 36.

² Cmd. 9889 (1956).

³ See an article by Dr. H. C. Gutteridge, K.C., in 12 *B.Y.B.I.L.* (1931),

business will probably have to consider only one Continental system of law instead of a score or more.¹ Mention may also be made of the Berne Convention of 1886, since amended several times,² by which an international union for the protection of the rights of authors over their literary and artistic works was formed.³ The Council of the League of Nations entrusted to the Institute for the Unification of Private Law, established by the Italian Government in Rome, the task of indicating the lines along which ultimate unity might be attained, and a proposal for the unification of the law of sale and of certain related topics is already in course of active preparation.⁴ This Rome Institute is now closely linked with the United Nations and the Council of Europe. On a smaller scale, the four Scandinavian countries, Finland, Denmark, Norway and Sweden, have signed conventions unifying in those countries the law relating to bankruptcy, to *res judicata* and to the mutual recognition of judgments.

(1) Unification of private international law The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of private international law, so as to ensure that a case containing a foreign element shall result in the same decision irrespectively of the country of its trial. So desirable is it to have a code of private international law common to the civilized world that several attempts have been made in the Hague Conferences on Private International Law to reduce the number of topics upon which the rules for the choice of law obtaining in different countries are in conflict. Prior to the seventh session in 1951 the conferences were confined to the Continental states of Europe, for, owing to the fundamental differences between the common law upon which the Anglo-Saxon systems are founded and the civil law which forms the basis of the European systems, there seemed little prospect of agreement being

¹ 12 *B.Y.B.I.L.* 18-19. The conventions have been ratified by eleven Continental countries.

² See the Berlin Convention, 1908; followed by a protocol on March 20, 1914; and the Rome Convention, 1928.

³ See S.R. and O. 1933; No. 253.

⁴ See an article by Dr. H. C. Gutteridge, K.C., in 14 *B.Y.B.I.L.* (1933), 75 et seq. For later developments, see 32 *Tulane Law Review*, pp. 541 et seqq. (B. A. Wortley). The proposal was considered by a Diplomatic Conference at The Hague in 1951. A further conference will probably be convened before long. The Italian Government, however, may itself convene a diplomatic commission to consider certain of the draft commercial laws prepared by the Rome Institute. For an account of the activities of the Rome Institute see 17 *B.Y.B.I.L.* (1936), 190-3.

reached between the two groups. The British delegates, however, attended the seventh and subsequent sessions, no longer as mere observers but as full members of the conference.

A step of great significance taken in 1951 was the drafting of a charter designed to place the Hague Conference upon a lasting footing by the establishment of a permanent bureau. This charter has been accepted by many countries, including Great Britain, and the Bureau, consisting of a Secretary-General and two Assistant Secretaries belonging to different countries, has been set up with its seat at The Hague. Its chief functions are to examine and prepare proposals for the unification of private international law and to keep in touch with the Council of Europe and with governmental and non-governmental organizations, such as the International Law Association. The Bureau works under the general direction of the Standing Governmental Commission of The Netherlands, which was established by Royal Decree in 1897, with the object of promoting the codification of private international law.¹

The Hague
Conference
now put
on per-
manent
footing

As matters stand at present, however, it would serve no useful purpose for an English book to give a detailed account of the admirable work done by the Conference, since unfortunately Great Britain has accepted none of the conventions that have been concluded with a view to the unification of private international law. It can only be hoped that the future will bring a change of heart.

In addition to the conventions mentioned above, many similar arrangements have been made between individual countries, as for example the bilateral conventions upon civil procedure concluded by Great Britain with a large number of foreign states. One of the most remarkable, and certainly one of the most interesting, of these is the Inter-Scandinavian Conventions, 1929-33, between Sweden, Norway, Denmark, Finland and Iceland. The first of these, which was signed on February 6, 1931, unifies the rules of private international law with regard to marriage, adoption and guardianship—all matters of personal status. The difficult impediment to the completion of this convention was the fact that Denmark and Norway follow the principle that the law of domicile governs most

Conven-
tions be-
tween in-
dividual
countries

¹ Accounts of the Seventh Conference are given in 38 *Grotius Society Transactions*, 25 et seqq.; 102 *University of Pennsylvania Law Review*, 348-55; 1 *American Journal of Comparative Law*, 275 et seqq.; 79 *Clunet*, 1071-1137 (Professor Offerhaus, President of the Conference).

questions of a personal nature, while Sweden and Finland make nationality the determining factor. They have resolved this difficulty by agreeing to maintain their respective attitudes so far as a conflict of laws between one of the Scandinavian countries and a non-Scandinavian country is concerned, but to adopt domicil as the guiding principle in inter-Scandinavian private international law. Thus, if a person belongs to one of the four countries but has been domiciled in one of the others for two years at least, or if subjects of one of the four countries marry and establish their matrimonial domicil in one of the others, the *lex domicilii* governs questions of adoption, guardianship and marriage, including in this last case the effect of marriage on movable property.¹ The term of two years' domicil is intended as a safeguard against abuses, especially that of taking up residence in a neighbouring country in order to evade the sanctions of the law of nationality.

Benelux
Conven-
tion

A more recent example of a limited convention is that concluded in 1951 between the Benelux states—Belgium, The Netherlands and Luxembourg—which unified the rules of private international law upon the more important matters, such as capacity and status, divorce, succession to property on death and the essential validity of contracts.²

Influence
of Perma-
nent Court
of Inter-
national
Justice

Another agency which, to a limited extent, had a unifying influence upon the rules of private international law was the Permanent Court of International Justice.³ This was the highest international tribunal in existence until the dissolution of the League of Nations, and though, of course, its decisions were not binding upon municipal courts in other disputes, it is obvious that, when it passed judgment upon a normal transaction of an essentially international nature likely to come before the courts of any country, its pronouncements deserved not merely to be respected but, other things being equal, to be followed. The outstanding instance of the influence exerted by the Permanent Court was the Serbian Loans case of 1929⁴ in which the question raised by France against Serbia was whether a loan issued by the Serbian Government, and mostly held by Frenchmen, was payable both as to principal and interest in

¹ The effect on immovables is governed by the *lex situs*.

² The convention is summarized by the Dutch delegate, E. M. Meijers, in

³ *American Journal of Comparative Law*, 1 et seqq.

⁴ See an article by Mr. W. E. Beckett, 11 *B.Y.B.I.L.* (1930), 1.

⁵ Publications of the Court, Series A, No. 20; see also the case of Brazilian Loans, Series A, No. 21; 11 *B.Y.B.I.L.* (1930), 17-21; 17 *B.Y.B.I.L.* (1936), 113-14.

paper or in gold francs. This type of question is one that affects any loan, whether issued by a Government or a private person, that contains what is called a gold clause.¹ Such clauses, which raise a difficult question of construction, have been the subject of litigation in many different countries, and it is noteworthy that there has been a marked tendency to adopt the general principles enunciated by the Permanent Court in the Serbian case.² It is only natural to presume that its successor, the International Court of Justice, will exert a similar unifying influence.

Though the matter seems to be of little importance, a word must be said about the name or title of the subject. No name commands universal approval. The expression 'Private International Law', coined by Story in 1834,³ and used on the Continent by Foelix in 1838,⁴ has been adopted by Westlake and Foote and most French authors. The chief criticism directed against its use is its tendency to confuse private international law with the law of nations or public international law, as it is usually called. There are obvious differences between the two. The latter primarily governs the relations between sovereign states and it may perhaps be regarded as the common law of mankind in an early state of development;⁵ the former is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a sovereign state.⁶ There is, at any rate in theory, one common system of public international law, consisting of the 'customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other',⁷ but, as we have seen, there are as many systems of private international law as there are systems of municipal law. Indeed it was this fact which made it difficult for the Permanent Court of International Justice to hold that it had jurisdiction under its statute to try the cases of the Serbian and Brazilian loans. Moreover, as often as not a question of private international law arises between two persons of the same nationality, as, for instance, where the issue is the

The name of the subject 'Private International Law'

¹ *Infra*, pp. 261 et seqq.

² See per Lord Russell of Killowen, *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161, at p. 173.

³ *Commentaries on the Conflict of Laws* (1st ed.), S. 9.

⁴ *University of Chicago Law Review* (Dec. 1935), p. 156.

⁵ C. W. Jenks, *The Common Law of Mankind* (Library of World Affairs, No. 41); Jessup, *Transnational Law*.

⁶ See, e.g. *In the Estate of Maldonado*, [1954] P. 223; *infra*, p. 57-59.

⁷ Oppenheim, *International Law* (7th ed.), i. 4.

validity of a divorce obtained by two English persons in a foreign country.

It would, of course, be a fallacy to regard public and private international law as totally unrelated. Some principles of law, such as the maxims *audi alteram partem* and *ut res magis valeat quam pereat* are common to both; some rules of private international law, as for example the doctrine of the 'proper law' of a contract, are adopted by a court in the settlement of a dispute between sovereign states;¹ equally, some rules of public international law are applied by a municipal court when seised of a case containing a foreign element.²

'Conflict of Laws' An equally common title to describe the subject is 'The Conflict of Laws'. This is innocuous if it is taken as referring to a difference between the internal laws of two countries upon the same matter. When, for instance, a question arises whether the assignment in France of a debt due from a person resident in England ought to be governed by English or by French internal law, it may be said that these two legal systems are in conflict with each other in the sense that they can each put forward claims to govern the validity of the assignment.³ But the title is misleading if it is used to suggest that two systems of law are struggling to govern a case. If an English court decides that the assignment must be governed by French law, it does not do so because English law has been worsted in a conflict with the law of France, but because it is the law of England, albeit another part of the law of England, i.e. private international law, that in the particular circumstances it is expedient to refer to French law. In fact, the very purpose of private international law is to avoid conflicts of law, and the one case, as Bar says, where a genuine conflict arises is where two territorial systems, differing in themselves, both seek to regulate the same matter, as, for example, where the bequest of a Greek subject dying domiciled in England is governed by the law of his domicile according to the English doctrine, but by the national law according to the Greek view.

Other names Other terms which have been used to describe the subject

¹ *Serbian Loans Case*, Permanent Court of International Justice; Ser. A, No. 20/21.

² e.g. the doctrine of sovereign immunity, *infra*, pp. 88 et seqq. The interaction of public and private international law has been fully canvassed by B. A. Wortley in his lectures to the Academy of International Law, published in *Recueil des Cours* (1954), pp. 245 et seqq. See also 8 *I. & C.L.Q.*, pp. 620-4, and the authorities there cited.

³ Holland, *Jurisprudence* (13th ed.), p. 421.

are 'International Private Law',¹ 'Intermunicipal Law',² 'Comity',³ and the 'Extra-territorial Recognition of Rights'.⁴

The fact is that no title can be found which is accurate and comprehensive, and the two titles 'Private International Law' and 'The Conflict of Laws' are so well known to, and understood by, lawyers that no possible harm can ensue from the adoption of either of them. Perhaps on balance the latter title is preferable, since it is a little unrealistic to speak in terms of international law if the facts of the case are concerned with England and some other country under the British flag.

¹ *In re Queensland Company*, [1892] 1 Ch. 219, criticized in Holland, *Jurisprudence*, pp. 422-3.

² Frederic Harrison, *Jurisprudence and the Conflict of Laws*, pp. 130 et seqq.

³ Phillimore, 'Commentaries on Private International Law or Comity'.

⁴ Holland, *Jurisprudence*, p. 398.

CHAPTER II

HISTORICAL ANTECEDENTS

1. The Roman Empire. *Pages 18-20.*
2. Fall of the Roman Empire, sixth to tenth centuries. *Pages 20-21.*
3. The period of territoriality, eleventh and twelfth centuries. *Pages 21-22.*
4. The era of the statutists, thirteenth to eighteenth centuries. *Pages 22-29.*
5. The theory of Savigny. *Pages 29-30.*
6. Modern theories. *Pages 31-38.*
7. Late development of English private international law. *Pages 38-43.*

ALTHOUGH private international law as found in this country is a substantive part of English law and is almost entirely the result of judicial decisions, its growth has been influenced to a considerable extent by the writings of jurists in other countries, and especially by the doctrines that have found acceptance on the Continent. It is still difficult to study the subject without at any rate a slight acquaintance with the general trend of Continental thought. It is therefore proposed to give here a short sketch of the historical development of this branch of law.¹

① *The Roman Empire.*

Conflicting
jurisdic-
tions under
the Empire

The state of things which necessitates a system of private international law, namely, a number of conflicting territorial laws, certainly existed in the Roman Empire, but the texts do not throw a great deal of light upon the manner in which the law of Rome resolved the conflicts.

The existence of conflicting territorial laws was due to the

¹ The only separate work in English of an historical nature is *Conflicts of Laws in the History of the English Law*, by Alexander N. Sack. It is contained in *Law: A Century of Progress 1835-1935*, pp. 342-454, but it has been printed separately by the New York University Press. Beale gives a full and valuable outline of the general history of the subject in *Conflict of Laws*, pp. 1880-1975. See also Wolff, pp. 19-51; Westlake, pp. 1-22; Yntema, *The Historic Bases of Private International Law*, 2 *American Journal of Comparative Law*, 296 et seqq. The standard foreign works are Lainé, *Introduction au droit international privé*, in two volumes, and Laurent, *Droit civil international* (1880), 8 vols. The modern French authors, however, all give short historical summaries, e.g. Weiss, *Manuel de droit international privé* (1920 ed.), pp. 339-65; Valéry, pp. 8-51; Niboyet (1944), iii. 40-196; Arminjon, *Précis de droit international privé* (3rd ed., 1947), pp. 71-139; Surville, *Cours élémentaire de droit international privé*, pp. 23-52; Batiffol, *Traité élémentaire de droit international privé* (3rd ed., 1959), pp. 7 et seqq.

fact that after the close of the Republic the Empire was broken up into a number of urban communities, each of which had its own magistrates, its own jurisdiction and to a certain extent its own system of positive law. Italy, with the exception of Rome, consisted of a large number of towns, generally called *municipia*, while the rest of the Empire was divided into separate provinces, the constitutions of which gradually approximated to the municipal system of Italy.¹

Every inhabitant was necessarily connected either with Rome or with one or more of these urban communities. The bond of connexion was either citizenship or domicil. Citizenship resulted from *origo*, adoption, manumission or election, so that it was possible for one person to be a citizen of several urban communities at the same time.² A person had his *origo* in the place to which his father, or if he was illegitimate to which his mother, belonged.³ Domicil meant the relation between a man and that urban community which he had chosen for his permanent abode, and therefore for the centre of his legal relations and his business. It was constituted by residence in a place accompanied by an intention to make the stay permanent.⁴

Clearly, then, a person could be connected with more than one urban community at the same time, as, for instance, when he was born in one place, adopted in another and domiciled in another. The result in such a case was that he became subject to several jurisdictions, since the rule was that he might be sued before the magistrates of any urban community of which he was a citizen or in which he had his domicil. An action against a man possessing this multiple connexion would immediately raise a question of private international law, that is to say, a question of the choice of law, for though a defendant might be sued in one of several places he obviously could not be subject to different and perhaps contradictory rules of law. It is probable that as a general rule a defendant was subject to his personal law,⁵ but the question is—which system of personal law? The law of his *origo* or of his domicil?

Savigny had no hesitation in affirming that when a person had citizenship and domicil in two different places he was subject to the system of law that obtained in the place where he was a citizen and not to the law of his domicil. If he was a citizen of more places than one, the law of the place of his birth applied.

¹ Savigny, *The Conflict of Laws*, Guthrie's translation, sec. 351, p. 45.

² *Ibid.*, pp. 46–48.

⁴ Savigny, *op. cit.*, p. 54.

³ Martin Wolff, p. 101.

⁵ Westlake, p. 11.

Origo and
domicil

Roman
rules as to
choice of
law

If he was a citizen of no place, he was subject to the law of his domicil.¹

It is clear, however, that all cases where a conflict of laws arose could not be determined by the simple method of applying the personal law of the defendant. If, for instance, the dispute concerned a contract or a disposition of property in which two persons belonging to different provinces were concerned, some other rule must have existed to show what law was applicable. The texts of the *Corpus Juris* are not particularly helpful, but certain isolated rules on the subject can be discovered.² For instance, questions concerning contracts appear to have been decided according to the law of the place where the contract was made, and transactions relating to property were governed by the *lex situs*.

(2) *Fall of the Roman Empire, sixth to tenth centuries.*

The era of
personal
laws

After the barbarians overthrew the Roman Empire and settled tribe after tribe in the territories where hitherto Roman law had prevailed, there arose what is called the system of personal laws. There ceased to be a territorial law applicable to all persons living within a certain defined space. Instead, each tribe, Visigoth, Lombard, Burgundian and so on, retained its own tribal law, in much the same way as nowadays Europeans, Hindus and Mohammedans in India have their own family and religious laws.³ Savigny has described the position as follows:⁴

‘When the Goths, Burgundians, Franks and Lombards founded kingdoms in the countries formerly subject to the power of Rome, there were two different modes of treating the conquered race. They might be extirpated by destroying or enslaving the freemen, or the conquering nations, for the sake of increasing their own numbers, might transform the Romans into Germans, by enforcing on them their manners, constitution and laws. Neither mode, however, was followed; for although many Romans were slain, expatriated or enslaved, this was only the lot of individuals and not the systematic treatment of the nation. Both races on the contrary lived together and preserved their separate manners and laws. From this state of society arose that condition of civil rights denominated personal rights or personal laws in opposition to territorial laws. The moderns always assume that the

¹ Savigny, op. cit., p. 76.

² Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, i. 285 et seqq.; Beale, *Conflict of Laws*, pp. 1880-5.

³ Westlake, p. 12.

⁴ Vol. i, c. 3. Cathcart's translation; and see Gibbon, *Decline and Fall of the Roman Empire*, c. xxxviii.

law to which the individual owes obedience, is that of the country where he lives; and that the property and contracts of every resident are regulated by the law of his domicile. In this theory the distinction between native and foreigner is overlooked and national descent is entirely disregarded. Not so however in the Middle Ages, where, in the same country, and often indeed in the same city, the Lombard lived under the Lombardic and the Roman under the Roman law. The same distinction of laws was also applicable to the different races of Germans. The Frank, Burgundian and Goth resided in the same place, each under his own law, as is forcibly stated by Bishop Agobardus. . . . "It often happens", says he, "that five men, each under a different law, may be found walking or sitting together."¹

There were, of course, exceptions to this system of personal or tribal laws. Criminal law and the canon law were of universal application, and there seem to have been certain matters, such as the tutelage of women, dowry and the extent of a husband's authority, which were subject to rules of general application. For the most part, however, it was necessary to discover the racial law of each party to a dispute and then to choose which of these laws was applicable.

It is obvious that under this system questions must frequently have arisen bearing a close analogy to those which nowadays fall within the sphere of private international law, but the manner in which they were resolved cannot now be completely and exactly stated.² Certain rules, however, are reasonably clear. Thus the general principle was that the system of law to which the defendant was subject must prevail in every suit. Capacity to contract was governed by the personal law of each party; succession was regulated by the personal law of the deceased; a transfer of property had to comply with the formalities required by the law of the transferor; in an action of tort the law of the wrongdoer prevailed; and marriage was solemnized according to the law of the husband.

Rules for
choice of
law

3. *The period of territoriality, eleventh and twelfth centuries.*

The state of society in this period was, broadly speaking, the direct antithesis of that which had existed for the previous three or four hundred years, for the system of personal laws, which lasted till about the end of the tenth century, gradually gave way to a system of separate territorial laws. The cause of this change was not the same everywhere.

System of
personal
laws dis-
appears

¹ Agobard became Archbishop of Lyons in 816.

² For an interesting account of the whole subject see *Étude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle*, by L. Stouff.

Influence
of feudal-
ism

The cause north of the Alps was the gradual transformation of society into a number of feudal units. Feudalism is the negation of personality. A Frank or a Burgundian who found himself in the position of vassal to a feudal overlord could not invoke the personal law of his race but would be obliged to recognize that he was merely the man of his lord, and as such subject to the law of his lord. This was essentially territorial, applicable without exception to all persons and to all transactions within the fief. The policy of a feudal superior was rigorously to disregard all laws save his own and to refuse protection to rights which had been acquired under an extraneous legal system. Thus, for instance, strangers were rightless. A person who passed from one fief to another was in danger of losing his property and even his freedom, and, though the treatment that he received varied infinitely in different fiefs, an almost universal burden was that he could not transmit his property on death.

In a world which is organized on a feudal basis it is clear that there is no room for what we now know as private international law. That branch of law presupposes inter-state or international relations and the readiness of courts to apply foreign laws when necessary in the interests of justice, but feudalism recognized nothing except the local law of the land. All laws were 'real' in the sense that they were effective only within the territory of the legislator.

Influence
of the
Italian
cities

South of the Alps the substitution of territoriality for personality was due, not to feudalism, but to the growth of the Italian cities. The bond of union between men in Italy came to be not race, not subjection to a common feudal overlord, but residence in the same city. There gradually emerged a large number of prosperous cities, such as Florence, Bologna, Milan, Pisa and Padua, which had succeeded in winning their independence, and which not only had their own territories but also possessed laws that showed many individual variations from the generally prevailing Roman law. It was this diversity of municipal laws, combined with commerce between city and city, that demanded some respect to be paid to alien laws and that ultimately gave rise to the science of private international law.

4. *The era of the statistes, thirteenth to eighteenth centuries.*

The doc-
trine of
reality be-
came un-
workable

In the thirteenth century the stage upon which determined efforts were made to formulate rules for fixing the proper field of law was thus set in Italy. The feudal doctrine of the reality of

laws became unworkable in a country like Italy, where commercial intercourse between the inhabitants of the various cities was a matter of daily occurrence. If that doctrine were to prevail, a Florentine who set foot in Bologna would be compelled to recognize the exclusive authority of the Bolognese law, since a contract made, a right acquired or a judgment delivered in Florence could have no effect in Bologna or in any other city.

It is to the credit of the jurists of those days that a search for some reasonable principle upon which these daily clashes could be composed was seriously instituted. This was the period of the renaissance of Roman law. The Italian universities were frequented by the learned from other parts of Europe and their jurists commanded a respect that is denied to their English successors in these latter days. Already the glossators of the eleventh century had done much for the revival of Roman law by the explanatory notes or *glossae* that they had added to the text of the *Corpus Juris*, but it was the post-glossators or commentators of the thirteenth century, the jurists attached to the law schools of Bologna, Padua, Perugia and Pavia, who made the first serious attempt to apply a scientific mode of reasoning to the reconciliation of conflicting laws. The method of the post-glossators was not merely to add explanatory notes to the text of the *Corpus Juris*, but to write elaborate and reasoned disquisitions upon the doctrines that were dealt with in the text. The relevance of the texts is not always apparent. Thus the post-glossators who wrote upon what we should now term private international law connected their disquisitions with the first law of the *Corpus Juris*. This was the law *De summa Trinitate et fide Catholica*, by which the Emperors Gratian, Valentinian and Theodosius had sought to compel all Roman citizens to observe the Christian faith. It began as follows:

Cunctos populos quos clementiae nostrae regit temperamentum in tali volumus religione versari, quam divum Petrum apostolum tradidisse Romanis religio usque adhuc ab ipso insinuata declarat.

There is no obvious connexion between an abstruse religious dogma and a solution of the legal problems arising from a variety of laws. Presumably the argument for connecting the two is this: since the enactment *Cunctos populos* is confined in terms to persons subject to the imperial rule and does not extend to other persons, it shows that Roman law, and therefore other laws, have a limited application. Therefore it is appropriate that any discussion as to which law applies to a dispute

between two persons subject to different legal systems should be appended to this particular enactment. The fact, of course, as Wolff has said, is that though the Italian jurists broke entirely new ground, 'they pretended that they only developed rules latent in the *Corpus Juris*'.¹ As an example of the method adopted we may cite the following gloss appended to this law of the Code by Accursius as early as 1228:²

The gloss
of Accur-
sius

Quod si Bononiensis Mutinae conveniatur non debet iudicari secundum statuta Mutinae quibus non subest cum dicat: quos nostrae clementiae regit temperamentum.

If a citizen of Bologna is sued at Modena he ought not to be judged according to the statutes of Modena to which he is not subject, since it says [in the law *Cunctos populos*] 'quos nostrae clementiae regit temperamentum'.

This gloss of Accursius set the fashion, and thereafter the post-glossators always treated their remarks on the conflict of laws as a commentary on the law *Cunctos populos* of the Code.³ Pre-eminent among these jurists was Bartolus (1314-57), successively professor of law at Bologna, Pisa and Perugia, who may aptly be described as the father of private international law.⁴ He was the first man to deal with the subject on principle, and his method was to determine the province of each rule of law. His preoccupation was—'What groups of relationship fall under a given rule of law?'⁵

The emi-
nence of
Bartolus

The statute
theory of
the post-
glossators

The post-glossators originated the statute theory which became the centre of interest in this department of law for many succeeding centuries. In the Middle Ages the word 'statute' was used to indicate any law, legislative or customary, in an Italian city which was peculiar to the city and contrary to the general law prevailing in Italy, i.e. contrary to the Roman law and to the Lombardic law. In its origin the object of the statute theory was to settle conflicts which arose, first, between the statutes of the numerous cities in Italy and, secondly, between the statutes and what may be called the 'common law', i.e. the legislation that affected all the subjects of the Emperor of Germany and the King of Lombardy.⁶

The post-glossators interpreted each statute in order to ascertain its object and thus to fix its rightful sphere of

¹ *Private International Law*, p. 26.

² Pillet, *Manuel de droit international privé*, ii. 338.

³ Weiss, *Manuel de droit international privé* (1920 ed.), p. 344.

⁴ See Woolf, *Bartolus of Sassoferrato*; Beale, *Bartolus on the Conflict of Laws*.

⁵ Wolff, *Private International Law* (2nd ed.), p. 24.

⁶ Pillet, *op. cit.* ii. 339.

application. To this end they classified each law according as it concerned a person or a thing, and in the result evolved the following doctrine:

First, all statutes are either real, personal or mixed. A real statute is one whose principal object is to regulate things, a personal statute is one that chiefly concerns persons, while a mixed statute is one that concerns acts, such as the formation of a contract, rather than a person or a thing.¹

Secondly, these three categories of statute differ in their field of application. Real statutes are essentially territorial. They apply exclusively with regard to immovables within the territory of the enacting sovereign, but they never apply in places outside that territory.² Personal statutes, on the other hand, apply only to persons domiciled within the territorial jurisdiction of the enacting sovereign, but they remain so applicable even within the jurisdiction of another territorial sovereign. A personal statute of Florence overrides a Bolognese personal statute if a Florentine does business in Bologna, provided that the business does not relate to something that falls within the scope of a real or a mixed statute. Mixed statutes apply to all acts done in the country of the enacting sovereign, even though they raise litigation in another country.

At first sight this classification of laws appears to afford a simple and effective solution, but the moment that we attempt to discover from the post-glossators what statutes are real and what personal we meet with the utmost confusion. The truth is, of course, that the problem is insoluble. Is, for instance, a law which regulates one's capacity to transfer land to be classified as personal because it concerns persons, or as real because it affects land? Some jurists in dealing with the subject of capacity distinguished between favourable and onerous statutes. The incapacity of infancy, for instance, which might be regarded as favourable, was to follow the person affected no matter where he went, but a law which made a person incapable of succeeding to property, being onerous, must cease to apply outside the territory of the legislator. Bartolus seems to have made the distinction between real and personal laws turn upon the grammatical construction of the enactment. A statute is real if things are mentioned first, e.g. *Bona decedentium veniant in primogenitum*; personal, if persons occupy the first place, e.g. *Primogenitus succedat in omnibus rebus*.³

Difficulty
of distin-
guishing
real from
personal
statutes

¹ Some jurists defined a mixed statute as one which affected both persons and things.

² Statutes relating to movables were personal, *mobilia sequuntur personam*; Wolff, p. 24.

³ According to Beale, *Conflict of Laws*, pp. 1890-1, this was merely 'an

The difficulty was aptly described in 1729 by the French jurist Froland:¹

'I fully agree that the statute real is concerned with a thing, the statute personal has to do with the person, and the statute mixed has to do with both thing and person. . . . But with all these distinctions the difficulties which I meet hundreds and hundreds of times do not seem yet removed; and my mind, hesitating because it is not sufficiently informed, often does not know what conclusion to reach. In my opinion it is not enough to know that the statute real has to do with a thing, that the statute personal has to do with the person, and that the statute mixed has to do with both thing and person. There is another difficulty much more important to solve; that is to know when the statute does concern the thing or the person or both: and that in my opinion is the question most embarrassing and most difficult to explain; and it does not appear to me that the old writers who were contented with general definitions have given us very certain rules in this particular.'

The statute theory in France In the sixteenth century the statute theory was carried into France, where it was developed and refined by several jurists, the most notable of whom were Dumoulin (1500-66), D'Argentré (1519-90), and Gui Coquille (1523-1603). The political organization of France rendered a study of the conflict of laws imperative. The different provinces, though politically parts of the same country as the States of America now are, each had a separate system of law, called *coutume* or custom. These customs varied in each province and therefore, owing to inter-provincial trade, were in constant conflict with each other. The jurists who wrote on the subject used the old term *statuta* to describe the customs.

The leading French jurists The French jurists of the sixteenth century elaborated the statute theory and made it applicable to every legal relation. In particular, mention may be made of Dumoulin and D'Argentré. Dumoulin, described by Westlake as 'one of the greatest legal geniuses' in the sphere of private international law,² was the first exponent of the doctrine that the law to govern a contract is the law intended by the parties,³ a doctrine which, as we

unfortunate illustration of a distinction which was one of the most original and ingenious discoveries of the great master; a discovery which his contemporaries could not make, and his successors for 500 years failed to understand. Yet the distinction is a necessary one; a statute might well be interpreted, either as determining personal status or as affecting the inheritance of property.'

¹ This extract from his *Mémoires concernant la nature et la qualité des statuts* is the translation of Beale, *Conflict of Laws*, p. 1905. ² 7th ed., p. 17.

³ Kuhn, *Comparative Commentaries on Private International Law*, pp. 9-10; Beale, pp. 1894-5

shall see, has been propounded in England for many years. D'Argentré, on the other hand, was essentially territorially-minded. He supported, not the autonomy of the parties, but the autonomy of the provinces.¹ He placed exaggerated emphasis upon the real statute, and although he admitted the existence of a third class, the mixed statute, i.e. one concerning both persons and things, he affirmed that it must be regarded as real. After saying that a law obtaining in the country of domicile and relating to the condition or quality of a person is a personal statute and must therefore be recognized in other countries (e.g. a rule which fixes the age of majority), he points out that some laws, although their operation appears to be confined to persons, have in reality a close connexion with property. He gives as an example a law which permits a bastard to be legitimated. At first sight the object of this is to confer family rights upon the child, but in truth it is something more than a personal law, since it carries the right of succession to the paternal property.

In the seventeenth century the Dutch jurists were chiefly responsible for the further development of the statute theory. Their fundamental principle was the exclusive sovereignty of the State. The United Netherlands consisted of a number of provinces, each with its own system of law, so that the same need arose for some body of doctrine which would enable conflicts between opposing laws to be resolved. The chief writers were Burgundus (1586-1649), Rodenburg (1618-68), Paul Voet (1619-77), Huber (1636-94), and John Voet (1647-1714).

The statute
theory in
Holland

Huber deserves particular notice if only for the influence that he has exercised upon the development of private international law both in England and in North America. This eminent jurist laid down the following three maxims, from which he considered a sufficiently comprehensive system for the reconciliation of conflicting laws could be evolved.

Ulric
Huber

- (a) The laws of a State have force only within the territorial limits of its sovereignty.
- (b) All persons who, whether permanently or temporarily, are found within the territory of a sovereign are deemed to be his subjects and as such are bound by his laws.
- (c) By reason of comity, however, every sovereign admits that a law which has already operated in the country of its origin shall retain

¹ Kuhn, op. cit., p. 10. For a fuller account of him see Beale, pp. 1895-8.

its force everywhere, provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought.¹

After pointing out in justification of the third maxim that nothing can be more destructive of international commerce than to neutralize rights validly acquired in one place merely because they are void according to a conflicting law elsewhere, Huber affirms the principle that all acts and transactions validly effected according to the law of a particular place are to be recognized as valid even in a country whose law would regard them as void, but that acts and transactions effected in a place contrary to the local law, being void *ab initio*, are void everywhere.² In other words, although each State is free by virtue of its sovereignty to construct its own system of private international law, it does not in fact act arbitrarily, but on the supposed principle of comity allows the operation within its own territory of a law that has already operated elsewhere. Comity and the pressure of international commerce require that acts duly performed in one jurisdiction shall be sustained in other jurisdictions.³ Thus was launched the theory of vested or acquired rights that has played so notable a part in the writings of Dicey and other English authors.

In the eighteenth century the statute theory continued to receive attention from the French jurists, some of whom favoured the Dutch doctrine that the application of laws was limited to the territory of the legislator, while others, such as Bouhier (1673-1746), increased the scope of personal statutes and so favoured the extra-territorial operation of laws.

Disappearance of the statute theory

It is needless to discuss the theory further. It has played a great part in breaking down the doctrine of territoriality, and it has found disciples even in modern times,⁴ but it lacks a scientific basis, and affords no solid ground upon which a sound and logical system can be erected. It is impossible to disagree with the opinion expressed by a learned American judge in 1872, who said:⁵

'We are led into an examination of the doctrine of real and personal statutes, as it is called by the Continental writers of Europe, a subject

¹ For a translation of the title *De Conflictu Legum*, and for an account of Huber's influence, see an article by D. J. Llewelyn Davies, 18 *B.Y.B.I.L.* (1937), 49-78.

² *American Journal of Comparative Law*, 307 (Professor Yntema).

³ Beale, iii. 1903-4.

⁴ e.g. Vareilles-Sommières, *La Synthèse du droit international privé*.

⁵ Porter J. in *Saul v. His Creditors* (1827), 5 Martin, N.S. 569, 588; Lorenzen, p. 733.

the most intricate and perplexed of any that has occupied the attention of lawyers and courts, one on which scarcely any writers are found entirely to agree, and on which it is rare to find one consistent with himself throughout. We know of no matter in jurisprudence so unsettled, or none that should more teach men distrust of their own opinions and charity for those of others.'

This is not a flattering epitaph upon a doctrine that had been developed by a series of eminent jurists with ingenuity and enthusiasm over a period of five hundred years.

⑤. *The theory of Savigny.*

The great German jurist, Savigny, made a decisive break with all former approaches to the subject in his book on the Conflict of Laws published in 1849,¹ in which he maintained that it was possible to construct a system of private international law common to all civilized nations, a theory that has been revived in recent years by an eminent American jurist.² Savigny derived little satisfaction from what had already been done. He dismissed the statute theory as being both incomplete and ambiguous and he denied the inference drawn by Huber from territorial sovereignty that a judge must apply his own law exclusively except in the case of rights already vested under some foreign law.

The theory
of the
natural
seat of
a legal
obligation

'This principle', he said, 'leads into a complete circle; for we can only know what are vested rights, if we know beforehand by what local law we are to decide as to their complete acquisition.'³

Savigny advocated a more scientific method. The problem, in his view, is not to classify laws according to their object, but to discover for every legal relation that local law to which in its proper nature it belongs. Each legal relation has its natural seat in a particular local law, and it is that law which must be applied when it differs from the law of the forum.⁴ The principal determinants of this natural seat are:

The domicile of a person affected by the legal relation.

The place where a thing, which is the object of a legal relation, is situated.

The place where a juridical act is done.

The place where a tribunal sits.⁵

¹ This was the final volume of his *System of Modern Roman Law*. It was translated into English by William Guthrie in 1869, and it is this translation that will be referred to in the following pages.

² P. C. Jessup, *Transnational Law* (1956).

³ Savigny, Guthrie's translation, pp. 102-3.

⁴ Savigny, op. cit., p. 89.

⁵ Ibid., p. 96.

The search for the appropriate local law must, however, be influenced by the freewill of the person interested, for in some cases, such as obligations, a party may freely submit himself to the authority of a particular legal system, while in others his submission results from his voluntary acquisition of a right. If, for example, he acquires land in a foreign country, an act which he is free to do or not to do, he must be taken to have accepted the authority of the *lex situs*.¹

Objections
to Savigny's
theory

The criticism that has been levelled against Savigny's theory in modern times is that it assumes the uniformity of legal relations in all systems of law.² This, as we shall see,³ is a false assumption. A person, for instance, who breaks a promise to marry another, commits a breach of contract according to most legal systems, but a tort according to others. If, therefore, the same set of facts may create either a contractual or delictual relation according to the system of law to which reference is made it is scarcely possible to determine the one natural seat of the resulting legal relation.

Perhaps a more apposite criticism in English eyes is that the system of private international law envisaged by Savigny is a will-o'-the-wisp, a goal easier longed for than found. Just as 500 years of argument produced no agreement upon what statutes were real and what personal, so now there are wide differences of opinion upon the most appropriate law to govern each legal relation. These juristic approaches to the subject are, in fact, incomprehensible to an English lawyer, or at any rate alien to his upbringing and traditions. As Frederick Harrison said many years ago:

'Our English conception of law, preserves us from the fantastic sophism which is current in parts of the Continent, that private international law can be erected into a uniform system by the meditations of jurists, and imposed by virtue of its logical consistency on the various tribunals of Europe.'⁴

Value of
Savigny's
views

Nevertheless, although it is true that the basis of Anglo-Saxon law is not logic but experience, it is submitted that the method adopted in practice by English courts corresponds in general with that suggested by Savigny. In the light of all the relevant circumstances, they attempt to decide each case according to the legal system to which it seems most naturally to belong.

¹ Ibid., pp. 89-90.

² 2 *American Journal of Comparative Law*, 312.

⁴ *Jurisprudence and the Conflict of Laws*, p. 123.

³ *Infra*, pp. 46 et seqq.

6. *Modern theories and developments.*¹

Two modern theories require a short survey.

The first is the theory, originating with Huber, that has been elaborated in recent years by Anglo-Saxon writers, especially by Dicey in England² and by Beale in the United States of America.³ This, which is called the theory of vested or of acquired rights, is based upon the principle of territoriality. A judge cannot directly recognize or sanction foreign laws nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision. The administration of private international law, however, raises no exception to the principle of territoriality, for what the judge does is to protect rights which have already been acquired by a suitor under a foreign law or a foreign judgment. Extra-territorial effect is thus given, not to the foreign law itself, but merely to the rights that it has created.

'English judges never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is, not a foreign law, but a right acquired under the law of a foreign country.'⁴

Support for this theory is claimed from the judgment of Sir William Scott in *Dalrymple v. Dalrymple*,⁵ where the question at issue was whether Miss Gordon was the wife of Mr. Dalrymple. Sir William Scott said:

'The cause being entertained in an English court it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin.'

This theory of acquired rights receives scant support at the present day and it has, indeed, been effectively destroyed by a learned French jurist.⁶ It no doubt stresses one of the principal objects of private international law, for, as we have already seen,

¹ For a full account of the various schools of thought see Beale, *A Treatise on the Conflict of Laws*, pp. 1924-75.

² *Conflict of Laws* (5th ed.), pp. 17, 43. ³ *Conflict of Laws*, pp. 1967-9.

⁴ Dicey, *Conflict of Laws* (5th ed.), p. 18, and see Holland, *Jurisprudence* (9th ed.), pp. 398-9; *In re Askew*, [1930] 2 Ch. 259, at p. 267, per Maugham J. The sentence cited from Dicey has disappeared from the later editions; see 7th ed., p. 9.

⁵ (1811) 2 Hag. Con. 54.

⁶ P. Arminjon, *Recueil des Cours* (1933), ii. 1-105; Cook, *Logical and Legal Bases of the Conflict of Laws*, *passim*; R. D. Carswell, 8 *I. & C.L.Q.*, pp. 268-88.

one of the elementary duties of a civilized court is impartially to protect existing rights even though they originated abroad, nevertheless it must be observed that to protect a right is to give effect to the legal system to which it owes its origin, for a right is not a self-evident fact, but a conclusion of law.¹ The theory is, indeed, open to several objections.

The theory
miscon-
ceives the
meaning of
'territorial
law'

First, the theory is advanced in explanation of an imaginary difficulty, namely, that of reconciling the recognition of a foreign law with the general principle that the laws of a sovereign state have force only within its own territorial jurisdiction. But this is to ascribe too narrow a meaning to the expression 'territorial law', which is not confined to the positive rules that regulate acts and events occurring within the jurisdiction, but includes also rules for the choice of law.² English rules for the choice of law are part of the law of England and when a court, for instance, tests the substantial validity of a contract made by two foreigners in Paris by reference to French law, it applies a rule imposed by the English sovereign and it may accurately be described as putting into force part of the territorial law of England.

The theory
begs the
question

Secondly, the theory is futile if its supposed object is to indicate what legal system governs each legal relation. As Savigny has insisted, it begs the question and produces a vicious circle. A judge who is merely directed to protect a foreign acquired right is not far advanced on his journey, for he still requires to fix the particular legal system, out of perhaps several possible choices, which is entitled to determine whether acquisition is complete—a search which is not facilitated by the bald statement that a right once vested is inviolable. Once the appropriate law to govern a case has been determined, the rights that it has vested in the litigant ought certainly to be recognized as far as possible, but that fact can scarcely be called 'the foundation of judicial decisions' on private international law.³ As Cook has shown, there are no fundamental and logical principles which infallibly indicate in any given situation what court has jurisdiction and what law is applicable.⁴

The theory
is untrue
in fact

Thirdly, the theory is untrue in fact, since the rules for the choice of law current in England and North America frequently

¹ 8 I. & C.L.Q., p. 285.

² Arminjon, op. cit., p. 27; see also Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341, 343; cited *infra*, p. 42.

³ Dicey, *Conflict of Laws* (5th ed.), p. 18.

⁴ *Logical and Legal Bases of Conflict of Law*, pp. 18-19.

require the enforcement of a right that is unrecognized, or even repudiated, by the chosen law.¹

A French widow, for instance, claims a share of her husband's English land. This claim raises a question either of succession or of the mutual property rights of husband and wife. If the English judge classifies the issue as one concerned with the mutual property rights of spouses he must enforce whatever right is granted to a widow by that particular part of French law. But if French law would have classified the case as one of succession, it may well be that the English judge will enforce a right that would not have been admitted in France.

Rights not
recognized
abroad
sometimes
recognized
in England

The theory as advocated by Beale is open to a difficulty of a different nature. This learned writer insists that the municipal law of the country under which a right has been acquired must be followed *to the exclusion of its rules for the choice of law*. This no doubt is correct as a general principle;² but if so, the result will frequently be that the right enforced by the court of the forum will not correspond with that recognized by the relevant foreign law. The logic of the vested rights theory requires that the court of the *forum* shall apply, not merely the domestic rules, but also the rules for the choice of law, of the legal system under which the right is said to have been acquired.

If, for instance, an American citizen were to die intestate domiciled in Italy, some American courts would apply the *lex domicilii* and would grant to the relatives such rights to the movable property of the deceased as would have been granted to them by the relevant provisions of the Italian Civil Code had the deceased been an Italian with no foreign connexions. But Italian private international law, in its insistence that intestacy is governed by the *lex patriae*, would deny that the relatives possess any such rights.

Again, it was said by Dicey in his lifetime that 'the incidents of a right of a type recognized by English law acquired under the law of any civilized country must be determined in accordance with the law under which the right is acquired'.³ This is scarcely true, for the incidents and consequences attached to a foreign right when enforced in England may differ from those recognized in its country of origin. An English court, for instance, may exact alimony from a husband living in England, although he and his wife are domiciled in a country where no such obligation is recognized.

Foreign
acquired
rights
sometimes
varied in
England

¹ Arminjon, op. cit., pp. 32-33; 47-48.

² *Infra*, pp. 62; 83.

³ Dicey, *Conflict of Laws* (5th ed.), p. 43, General Principle No. V.

(ii) Local law theory

The second and more recent theory is that which is generally called the *local law* theory.¹ This was expounded with his accustomed vigour by the late Walter Wheeler Cook, who differed from former jurists with regard to the value of so-called fundamental principles. His method, congenial to English lawyers, was to derive the governing rules, not from the logical reasoning of philosophers and jurists, but by observing what the courts have actually done in dealing with conflict of law cases. He stressed that what lawyers investigate in practice is how judges have acted in the past, in order that it may be prophesied how they will probably act in the future. A statement of law is 'true', not because it conforms to an alleged 'inherent principle', but because it represents the past, and therefore the probable future, judicial attitude.

The gist of the local law theory as formulated by Cook is that the court of the *forum* recognizes and enforces a local right, i.e. one created by its own law. This court applies its own rules to the total exclusion of all foreign rules. But, since it is confronted with a foreign-element case, it does not necessarily apply the rule of the forum that would govern an analogous case purely domestic in character, but, for reasons of social expedience and practical convenience, takes into account the laws of the foreign country in question. It creates its own local right, but fashions it as nearly as possible upon the law of the country in which the decisive facts have occurred. Pursuing a similar idea, Judge Learned Hand has said:

'When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. . . . However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by the sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.'²

Lord Parker spoke to much the same effect in an English case:

'Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the

¹ Cook, *op. cit.*, especially ch. i; 41 *H.L.R.* 421; 58 *H.L.R.* 361; Stumberg, *Conflict of Laws*, pp. 7-15; 53 *L.Q.R.* 556; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 30-37.

² *Guinness v. Miller* (1923), 291 Fed. 768. For the difference between this statement and the view of Cook see Cavers in 63 *Harvard Law Review*, 822.

foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise.¹

Since the court of the forum adopts the view that the chosen law would have taken not of the actual case, but of an equivalent domestic case, it does not necessarily recognize the right that would have been vested in the plaintiff according to that law. If the court of the chosen law had tried the actual case, it would not have regarded it as a domestic case. Owing to the presence of foreign elements, it would have been guided by its own choice of law rules, and therefore it might well have applied some law other than its own domestic system. Cook sums up the theory in these words:

"The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases, and subject to the exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to the very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*. The rule thus "incorporated" into the law of the forum may for convenience be called the "domestic rule" of the foreign state, as distinguished from its rule applicable to cases involving foreign elements. The forum thus enforces, not a foreign right, but a right created by its own law."²

It is scarcely deniable, however, that this local law theory is little more than what a learned writer has stigmatized as a sterile truism—sterile because it affords no basis for the systematic development of private international law.³ To remind an English judge, about to try a case containing a foreign element, that whatever decision he gives he must enforce only the *lex fori*, is a technical quibble that explains nothing and solves nothing. It provides no guidance whatever upon the limits within which he must have regard to the foreign law. The theory, indeed, marks a retrogression from the more scientific and more satisfying thesis of Savigny.

Local law
theory of
little
value

¹ *Dynamit Actien-Gesellschaft v. Rio Tinto Co.*, [1918] A.C. 292, 302.

² *Op. cit.*, pp. 20-21.

³ Yntema, 2 *American Journal of Comparative Law*, 317.

Conclusion:
Territorial
sovereignty
is not
abdicated

What then is the true position as it appears to an English lawyer? What is the theoretical or doctrinal basis of English private international law? In considering its nature do we find ourselves perplexed by the enigma that apparently it subordinates the sovereignty of the *lex fori* to that of a foreign power? To answer this last question first, the position surely is that to admit the binding force of a foreign law involves no abdication of sovereignty. A legislator realizes that his own positive rules of law, though in his view best suited for matters solely connected with his own country, are not always the right and proper rules for the regulation of matters that contain some foreign element. He therefore provides his own special rules for dealing with such cases—rules which specify when his courts shall be competent to try a foreign-element case, and which indicate the particular legal system that shall guide the courts in their exercise of this jurisdiction. These rules are as much part of his own territorial law as those which regulate the conveyance of land in his own country.

Rules for
choice of
law not
deducible
from any
one doc-
trine

But on what principle are the rules constructed? Is there one overriding principle from which they can all be deduced? Must they conform to a single doctrine? Are there certain maxims or axioms by reference to which the correct solution of all the diverse cases that arise in practice can be discovered? Do our difficulties disappear if we are reminded that all laws are personal, or that they are all real, or that every right duly established under the law of a civilized country must in general be sanctioned by an English judge? Clearly, such vain imaginings, such infallible nostrums, are untrue of English private international law. They are alien to the Anglo-Saxon tradition and if offered in argument would be a matter of surprise to an English judge. The English lawyer cannot but agree, at least in principle, with the teaching of Cook. His instinct is to test a proposed rule by its practical bearing upon normal human activities and expectations. It is by this method that in his opinion the purpose of law, which at bottom is to promote justice and convenience, can best be furthered. He is nothing if not an empiricist and a pragmatist. This is the spirit in which the rules for the choice of law are conceived. There is no sacred principle which pervades all decisions, but when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give

effect to the foreign rules. What particular foreign law shall be chosen depends upon different considerations in each legal category. Neither justice nor convenience is promoted by rigid adherence to any one principle; it is preferable that the various principles should fit the needs of the different legal relations, and should harmonize with the social, legal and economic traditions of England. Thus, for instance, the law to govern capacity will vary according as the matter *sub judice* is a mercantile contract, a contract of marriage or a disposition of property. Again, the law to govern the essential validity of a contract is the law of the country with which the transaction has the closest connexion, but the ascertainment of this will necessitate the consideration of a variety of factors, such as the place of contracting, the place of performance, the business seats of the parties and the legal language in which the bargain is expressed. Weight is given to each factor, but none is exclusive. Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded upon the reasoning of jurists, but it is beaten out on the anvil of experience. It is difficult to disagree with the view of a learned American writer that Anglo-American tribunals have always attempted to reach a just decision in accordance with their own conceptions of utility and justice.¹

It would be ungenerous, even in an historical survey so superficial as this, to omit all mention of Joseph Story, who published his *Commentaries on the Conflict of Laws* in 1834. It is no exaggeration to say that he produced order out of almost unimaginable chaos. No comparable treatise upon the subject had previously been published in the English language. There was but a handful of English decisions. His only sources of inspiration were the confusing and conflicting disquisitions with which the Continental statisticians had darkened counsel. Nevertheless his book is such a complete storehouse of the leading principles advanced by these Continental writers that it affords to the curious reader an adequate account of these uninviting materials. But the real service that Story rendered to private international law was that, by the elaboration of a connected series of principles consistent with the spirit of the common law, he brought about what can only be described as the renaissance of the subject. He gave a new impulse to its study. By laying stress upon the more important conclusions

Influence
of Story

¹ Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 83 Y.L.J. 736.

of the Continental writers, he taught English lawyers that the system of private international law which they were gradually evolving could not command the respect of the world unless they relaxed somewhat their traditional ideas and considered the views of those who had laboured in a different legal atmosphere.

The defect of Story's work is his lack of discrimination. He pays excessive respect to the Continental writers, from Bartolus in the fourteenth century to Boullenois who died in 1762. At times, indeed, his commentaries produce the impression that he did not consider any statement of the law to be satisfactory unless it was accompanied by a full description of the various, and generally conflicting, theories of the statutists. He made little attempt to separate the gold from the dross, to eliminate the writers of doubtful authority or to compare the respective value of the different theories, but tossed the conflicting views together almost like the words in a dictionary.¹

Nevertheless, the extent of the influence which Story has exercised over the modern system of private international law can scarcely be overestimated.

7 Late development of English private international law.

History of
English
private in-
ternational
law

When the mind dwells on the vigour and the duration of the Continental discussions, it is at first sight surprising to learn that English lawyers did not find it necessary to deal with the problem of a conflict of laws until a couple of centuries ago. Yet such is the case. There was not even an awareness of the problem in this country until the eighteenth century, it was not mentioned by Blackstone, and the middle of the nineteenth century had been reached before a connected treatise on private international law was written by an Englishman.² Professor Sack has rendered a valuable service in tracing this tardiness of development to the special features of the common law and to the English system of administration of justice.³ His explanation in brief is as follows.

Originally
no juris-
diction at
common
law over
foreign
causes

The intra-national conflicts, that had long been inevitable on the Continent owing to the existence of different legal systems within the territory of a single nation, could not arise in England after the whole country had been brought under the sway of a single common law. International conflicts were precluded by the rule, established at an early date, that the common law

¹ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, p. 120.

² Westlake, 1858.

³ See *supra*, p. 18, note 1.

courts were unable to entertain foreign causes. This rule was the necessary result of the practice by which the members of the jury were summoned from the place where the operative facts had occurred, since their function was to decide according to their knowledge of the facts. The sheriff could scarcely summon a jury from a foreign country in which the dispute between the parties had arisen. It is true that special courts were set up to deal with cases that might contain foreign elements. The King established courts to consider complaints made by foreigners whom he had invited to England and who were therefore entitled to his protection. The staple courts and the pie-powder courts decided mercantile disputes. But in each of these cases the law administered was the law merchant, which, at any rate in theory, was regarded as a universally binding system. There was no question of applying a foreign law at variance with the law of England.

When English traders began to extend their commercial activities beyond the seas, it was inevitable that they should occasionally suffer from this inability to obtain redress in respect of transactions effected abroad. A remedy ultimately became available to them in the Court of Admiralty, which extended its jurisdiction to foreign causes as early as the middle of the fourteenth century. By the middle of the sixteenth century it was competent to try disputes arising out of mercantile dealings abroad.¹ Again, however, there was no question of choice of law, for the court dispensed the general law maritime or, in cases of purely commercial matters, the general law merchant.²

By the end of the sixteenth century the common law courts had begun to compete for this jurisdiction. The technical difficulty that formerly stood in their way had disappeared, for the jury relied no longer on its own knowledge but on the testimony of witnesses. The initial step was to deal with 'mixed' cases, i.e. those in which some of the operative facts occurred in England, others abroad, as, for example, where the defendant failed to perform in Spain a charter-party that had been made in England.³ The final step, that of trying cases connected solely with a foreign country, was facilitated by the new division of actions into local and transitory. In transitory actions, i.e. where the cause of action might have arisen anywhere, there was no necessity to summon the jury from one particular neighbourhood. The plaintiff could sue the defendant where he was

The Court
of Admir-
alty

In six-
teenth cen-
tury for-
eign causes,
if transi-
tory, tri-
able at
common
law

¹ Sack, *op. cit.*, pp. 353-5.

² *Ibid.*, p. 355.

³ *Ibid.*, pp. 359-60.

to be found, and could lay the *venue* (i.e. the place from which the jury was summoned) where he liked. By Coke's time it was settled that the courts at Westminster could entertain all actions that were of a transitory nature, such as actions for breach of contract or upon bills of exchange, notwithstanding that any relevant fact was connected with a foreign country.¹

No consideration
given to
foreign law

Thus the stage was reached at which it should have been necessary to deal with the familiar problem of choice of law. But in the case of mercantile disputes, which must have formed the bulk of those coming before the courts, the problem was avoided for many generations, since they were decided according to the general law merchant common to European nations. By the nineteenth century, when the international nature of this law had ceased and it had been incorporated as one of the municipal branches of English law, the modern doctrines of private international law had already taken root in England.² Moreover, although the common law courts had expressed their willingness to take cognizance of foreign law, they were reluctant to entertain actions in which this would be necessary.³ When the necessity became pressing, their first reaction was to require foreign cases to be tried by the appropriate court abroad, and to accompany this with a readiness to enforce the foreign judgment in England. This recognition of foreign judgments, which dates at least from 1607,⁴ has never involved a reference to the foreign municipal law. All the English courts have ever done in this connexion is to inquire whether the foreign court had jurisdiction in the international sense and whether its judgment was final.⁵

Emergence
of a more
rational
theory in
eighteenth-
century
cases

The growth of the British Empire inevitably led to greater intercourse between British subjects owing obedience to a variety of laws, and consequently to an increase in the number of disputes that required, if justice were to be done, a reference to something more than the common law of England. Yet the emergence of anything approaching a connected system of private international law proved to be a slow and laborious process.

Robinson v.
Bland

In *Robinson v. Bland*⁶ in 1760, the question whether a contract valid by the law of France, where it was made, though

¹ Sack, op. cit., pp. 370-1. ² Ibid., pp. 375-7. ³ Ibid., p. 381.

⁴ *Wier's Case*, 1 Rolle Abr. 530 K. 12, cited Sack, op. cit., p. 382.

⁵ The cases such as *Penn v. Baltimore* (1750), 1 Ves. Sen. 444, in which equity exercises personal jurisdiction in respect of acts occurring abroad, does not involve the application of foreign law; *ibid.*, p. 378, *infra*, pp. 614-24.

⁶ 2 Burr. 1077; 1 W. Bl. 234.

void by English law, could be sued upon in England was discussed but not decided. The plaintiff had lent £300 to *X* in Paris, which *X* immediately lost to the plaintiff by gaming, together with an additional £372. *X* gave the plaintiff a bill of exchange payable in England for the whole amount. It was found that in France 'money lost at play, between gentlemen, may be recovered as a debt of honour before the Marshals of France, who can enforce obedience to their sentences by imprisonment'.¹ After the death of *X* the plaintiff brought *assumpsit* against his administrator on three counts: on the bill of exchange, for money lent, for money had and received. It was held that the bill of exchange was void and that no action lay for the recovery of the money won at play. The plaintiff, however, was held entitled to recover on the loan. The reason for the decision given by two of the three judges was that the laws of France and of England were the same on all these points, and that therefore it was unnecessary to consider which law would apply had there been a difference between them. The judges, however, expressed their opinions on the question. Wilmut J. considered it 'a great question', but inclined to the belief that a claim contrary to public policy could not be pursued in England. Denison J. felt that English law would govern, since the plaintiff had chosen an English forum. It was left to Lord Mansfield to give a more modern flavour to the discussion.

'The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom.'²

He amplified his remark as to the exception in these words:

'The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.'³

This was the first mention of the doctrine that the law to govern a contract is the law intended by the parties. But what is noteworthy about the decision is that as late as 1760 the rules on so important a matter were completely unsettled.

¹ Wilmut J. described it as 'this wild, illegal, fantastical Court of Honour!', p. 1082.

² 1 W. Bl. at pp. 258-9.

³ 2 Burr. at p. 1078.

In 1775 in *Mostyn v. Fabrigas*¹ Lord Mansfield also adumbrated part of the rule that now governs liability in tort, though it was not finally settled until 1870.² He laid down that what was a justification by the *lex loci delicti* could be pleaded as a defence to an action in England.

Other principles suggested or established in the eighteenth century were that the *lex loci celebrationis* governs the formal validity of a marriage,³ that movables are subject to the *lex domicilii* of the owner for the purpose of succession⁴ and bankruptcy distribution,⁵ and that actions relating to foreign immovables are not sustainable in England.⁶ It was not, however, until nearly the close of the century that a clear acknowledgment was made of the duty of English courts to give effect to foreign laws. It was made by Lord Mansfield.

'Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.'⁷

The nineteenth century Thus the eighteenth century represents the embryonic period of private international law, a period which extended to at least the middle of the next century. As late as 1825 Best C.J. felt justified in remarking that 'these questions of international law do not often occur',⁸ and though the era of development was at hand, a considerable time had yet to pass before the main rules were determined. Thus, although the rules to govern contracts, torts and legitimation were laid down in 1865, 1869 and 1887 respectively, it was not until 1895 that the dependence of divorce upon domicile, as regards both jurisdiction and choice of law, was established. Such matters as capacity, nullity jurisdiction and the law to govern the assignment of movables, whether tangible or intangible, are still controversial. The end of the formative period is not yet in sight. There are, in fact, many transactions and events common in daily life that are quite untouched by any but comparatively

¹ (1774), 1 Cowp. 161.

² *Phillips v. Eyre* (1869), L.R. 6 Q.B. 1.

³ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395.

⁴ *Pipon v. Pipon* (1744), Amb. 25.

⁵ *Solomons v. Ross* (1764), 1 H. Bl. 131 (N.).

⁶ *Shelling v. Farmer* (1726), 1 Strange 646.

⁷ *Holman v. Johnson* (1775), 1 Cowp. 341. Lord Stowell spoke to the same effect in *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54, cited *supra*, p. 31.

⁸ *Arnott v. Redfern* (1825), 2 C. & P. 88.

ancient decisions, and there are many upon which the decisions are so hesitating and vacillating that it is still impossible to extract with assurance the governing principle. Moreover, the number of decisions on the subject is trifling in comparison with the case law that surrounds such topics as contracts and torts.

An important fact, however, and one that should never be overlooked either by the student or the practitioner, is that many of the older decisions are faulty and dangerous guides, and especially so when the point at issue has been the subject of more recent adjudication. This is one sphere in which the wisdom of our elders is less sacrosanct than usual. We can affirm without exaggeration that to cite a decision upon private international law of 150 years ago is little more helpful than to search for the law of landlord and tenant in the medieval reports of the Common Pleas. In fact we can go further and say that a decision no more than seventy or eighty years old is suspect. The reason is that the time during which the courts have addressed themselves seriously to the construction of a connected series of principles is all too short for anything like a complete and comprehensive system to have yet emerged, especially when it is remembered that private international law touches every branch of law. The early judges worked on virgin soil, and their decisions were necessarily hesitating and tentative. Circumstances have necessitated a process of trial and error, and unless it is realized that the early decisions frequently represent the halting steps of pioneers it will be long before this branch of law attains a state of elegant cohesion. If we are content to justify an opinion of today upon an early decision, however precise and unambiguous, without taking into account more recent developments of the subject as a whole, nothing but confusion and chaos can ensue.

The older
English
decisions
are of
doubtful
value

CHAPTER III

THE CONSECUTIVE STAGES IN AN ACTION INVOLVING A CONFLICT OF LAWS

Introductory. *Pages 44-45.*

1. Jurisdiction of the English court. *Page 45.*
2. Classification of the cause of action. *Pages 45-51.*
3. Selection of the *lex causae*. *Pages 51-59.*
4. Application of the *lex causae*. *Pages 60-86.*

INTRODUCTORY

Chronology of a conflict of laws case

IT is now proposed, before dealing with individual topics, to describe in their order of sequence the various matters that may require attention by the court in a case containing a foreign element. Stated summarily, the sequence of possible questions in such an action is as follows:

1. *Jurisdiction of the English court.*

Jurisdiction

The first and obvious essential is that the court should possess jurisdiction over both the defendant and the cause of action.

2. *Classification of the cause of action.*

Allocation of the question to its correct legal category

Having satisfied itself that it possesses jurisdiction, the court must next determine the juridical nature of the question that requires decision. Is it, for instance, a question of breach of contract or the commission of a tort? Until this is determined, it is obviously impossible to apply the appropriate rule for the choice of law and thus to ascertain the *lex causae*.

3. *Selection of the lex causae.*

Selection of *lex causae* based upon some connecting factor

Having classified the cause of action, the next step is to select the *lex causae*, i.e. the legal system that governs the matter. This selection will be conditioned by what has aptly been called a connecting factor,¹ i.e. some outstanding fact which establishes a natural connexion between the factual

¹ Falconbridge, 53 *L.Q.R.* 236, adopted by Robertson, *Characterization in the Conflict of Laws*, p. 92. Lorenzen, 20 *Columbia Law Review*, 268, uses the expression 'point of contact'; Unger, 19 *Bell Yard*, 3: 'elements of introduction'; Nussbaum, 40 *Columbia Law Review*, 1464: 'localizator'. The French and German expressions are *point de rattachement* and *anknüpfungspunkt*.

situation before the court and a particular system of law. The connecting factor varies with the circumstances. If, for instance, a British subject dies intestate, domiciled in France, leaving movables in England and land in Scotland, his movables will be distributed according to the law of France because of his domicile in that country, but Scots law, as being the *lex situs*, will determine the succession to the land.

4. *Application of the lex causae.*

The final step is to decide the dispute in accordance with the chosen law. This task is not always as simple and straightforward as it seems at first sight, for if a foreign law represents the *lex causae* the exact meaning to be given to the word 'law' in the context is often a matter of controversy. It may be clear, for instance, that the movables of a deceased person are to be distributed in accordance with French law, but it may not be so clear whether this direction confines the judge to the internal law of France or whether it requires him to consider the French rules of private international law. This problem necessitates an inquiry into the doctrine of *renvoi*. We will now consider these four matters in more detail.

Ambiguity
of the ex-
pression
'foreign
law'

1. *Jurisdiction of the English court*

This is the one of the four matters that must await more detailed treatment.¹ It is enough to say at this stage that the jurisdiction of the court must be available to the plaintiff and must be exercisable over both the defendant and the cause of action. As will appear later, one person, the alien enemy, has no right of recourse to the courts, while foreign sovereigns and certain other persons, such as ambassadors, are immune from the jurisdiction. Again, the general rule is that no action lies against a defendant unless he is personally present in England or unless he submits to the jurisdiction. However, despite such presence, certain proceedings affecting status, such as a petition for divorce, cannot in general be instituted unless the defendant is domiciled in England.² Finally, certain causes of action, such as trespass to foreign land, are not triable in England.³

2. *Classification of the cause of action*

What is meant by the 'classification of the cause of action' is the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to

Meaning of
'classifica-
tion'

¹ *Infra*, pp. 87 et seqq. ² *Infra*, pp. 383 et seqq. ³ *Infra*, pp. 595-6.

reveal the relevant rule for the choice of law.¹ The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, seised of a foreign element case, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what rule for the choice of law to apply. He must ascertain the true basis of the plaintiff's claim.² He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the *lex fori*, the latter by the *lex domicilii*.

Difficulties that may attend classification This process of classification, which consciously or unconsciously must always be performed, is usually accomplished automatically and without difficulty. If, for instance, the defendant is sued for the wrongful detention in France of the plaintiff's chattels, the factual situation before the court clearly raises a question of delict. Occasionally, however, the matter is far from simple.

In the first place, it may be a case near the line in which it is difficult to determine whether the question falls naturally within this or that juridical category.

Secondly, it may be a case where English law and the relevant foreign law hold diametrically opposed views upon the correct classification. There may, in other words, be a conflict of classification, as, for instance, where a breach of promise to marry is regarded by French law as a tort, but by English law as a breach of contract.

Difficulties illustrated by the Maltese Marriage Case These two difficulties are well illustrated by the historic *Maltese Marriage Case*,³ decided by the Court of Appeal at

¹ An alternative English word for classification is 'characterization'. In French it is called *qualification*. The problems that it raises, since their discovery by Kahn in 1891 and Martin in 1897, have been widely discussed both in England and abroad. The following are the chief contributions in English: 15 *B.Y.B.I.L.* 46-81 (Beckett); Robertson, *Characterization in the Conflict of Laws* (1940); Falconbridge, *Conflict of Laws*, pp. 50-123; Cook, *Logical and Legal Bases of the Conflict of Laws*, pp. 211 et seqq.; Lorenzen, 20 *Columbia Law Review*, 247 et seqq., and pp. 743 et seqq.; Unger, 19 *Bell Yard*, 6; W. R. Lederman, 29 *Canadian Bar Review*, 1-33, 168-84; Graveson, pp. 43 et seqq.; Wolff, *Private International Law*, pp. 146-67; Dicey, pp. 41-56; Morris, *Cases on Private International Law*, pp. 23-25; 74 *L.Q.R.* 503 et seqq.

² *In the estate of Musurus*, [1936] 2 All E.R. 1666, 1667 per Sir Boyd Merriman.

³ *Anton v. Bartolo*, Clunet (1891), 1171. For a fuller and more detailed account see Robertson, *Characterization in the Conflict of Laws*, pp. 158-62; 15 *B.Y.B.I.L.* 50, note 1; Wolff, op. cit., p. 149.

Algiers in 1889, which made the problem of classification a fashionable subject of study.

A husband and wife, who were domiciled in Malta at the time of their marriage, acquired a French domicil. The husband bought land in France. After his death his widow claimed a usufruct in one quarter of this land. The claim was sustainable if it was governed by Maltese law, but would fail if it were tested by French law.

There was uniformity in the rules for the choice of law of both countries: succession to land was governed by the *lex situs*, but matrimonial rights were dependent upon the *lex domicilii* at the time of the marriage.

The first essential, therefore, was to decide whether the facts raised a question of succession to land or of matrimonial rights. At this point, however, a conflict of classification emerged. In the French view the facts raised a question of succession, in the Maltese view a question of matrimonial rights.

When a conflict of this nature arises it is apparent that *if a court applies its own rule of classification*, the ultimate decision on the merits will vary according to the country in which the action is brought. On this hypothesis, the widow would have failed in France but have succeeded in Malta.¹

The crucial question, therefore, is—upon what principles do English judges classify the cause of action? Or, to put it in another way—according to what system of law must the classification be made? Must it be made according to the internal law of England, on the ground that the internal rules and the rules of the conflict of laws in any country are based upon the same legal conceptions? It is arguable, for instance, that when English private international law submits intestate succession to movables to the *lex domicilii* of the deceased, the expression ‘intestate succession’ must be given the meaning that it bears in English internal law and not a more extensive meaning that may be attributed to it in the foreign domicil. In opposition to this view, which is advocated by Bartin and many other jurists, it has been suggested that classification must be based upon the ‘essential general principles of professedly universal application’ of analytical jurisprudence and comparative law.² To solve the problem in this scientific manner, desirable though it certainly may be, is scarcely practicable so long as agreement is lacking upon general jurisprudential principles.

Upon what principles must classification proceed?

¹ In fact the French court applied the matrimonial law of Malta.

² Sir Eric Beckett, 15 *B.Y.B.I.L.* 59.

Classification is made on basis of English private international law

It must, in fact, be admitted that classification of the cause of action is in practice effected on the basis of the *lex fori*; i.e. an English judge, by an application of the principles of English law, makes his own analysis of the question before him, and after determining its juridical nature in accordance with those principles assigns it to a particular legal category. But, since the classification is required for a case containing a foreign element, it should not necessarily be identical with that which would be congenial to a purely domestic case. Its object in this context is to serve the purposes of private international law and, since one of the functions of this department of law is to formulate rules applicable to a case that impinges upon foreign laws, it is obviously incumbent upon the judge to take into account the accepted rules and institutions of foreign legal systems.¹ It follows, therefore, that the judge must not confine himself to the concepts or categories of English internal law, for if he were to adopt this parochial attitude, he might be compelled to disregard some foreign concept merely because it was unknown to his own law. The concepts of private international law, such as 'contract', 'tort', 'corporation', must be given a wide meaning in order to embrace 'analogous legal relations of foreign type'.² In the words of one learned writer:

'The various legal categories, into one of which the judge must decide that the question falls before he can select his conflicts rule, must be wider than the categories of the internal law, because otherwise the judge in a conflicts question will be unable to make provision for any rule or institution of foreign law which does not find its counterpart in his own internal law, and thus one of the reasons for the existence of the science of conflict of laws will be defeated.'³

Two examples will show that English judges have been prepared to solve the problem of classification in this broad spirit.

In *De Nicols v. Curlier*:⁴

A husband and wife, French both by nationality and by domicile, were married in Paris without making an express contract as to their proprietary rights. Their property, both present and future, thus became subject by French law to the system known as *communauté des biens*. The husband died domiciled in England and left a will which disregarded his widow's rights under this French doctrine of community. The widow took proceedings in England to recover her community share.

¹ Sir Eric Beckett, 15 *B.Y.B.I.L.*

² Nussbaum, 40 *Columbia Law Review*, 1470.

³ Robertson, *op. cit.*, p. 33.

⁴ [1900] A.C. 21.

1900 A.C. 21

The rule of English private international law applicable to a case of this nature is that the proprietary rights of a spouse to movables are governed primarily by any contract, express or implied, that the parties may have made before marriage. Failing a contract, the rights are determined by the law of the domicile of the parties at the death of the deceased spouse. Thus the problem of classification was whether the right claimed by the widow was to be treated as contractual or testamentary, for only after that had been decided would it be possible to choose between the French law governing the contract and the English law governing testamentary questions. It was clear that in the eyes of English internal law no contract had been made, but the House of Lords held that according to French law a husband and wife are bound by an implied contract to adopt the system of community, despite the absence of an express agreement to that effect. Thus the court, by its readiness to recognize a foreign concept, widened the category of contract as understood by English internal law.

A further illustration of the international spirit in which English judges fulfil the task of classification is that, when required to determine whether the *res linguosa* is to be regarded as land and thus subject to the *lex situs*, they abandon the distinction between realty and personalty in favour of the more universal distinction between movables and immovables. As one judge remarked:

Subject
illustrated
by classification
of
proprietary
interests

‘Out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognize and act on a division otherwise unknown to our law into movable and immovable.’¹

Thus land in England, subject to a trust for sale but not yet sold, is regarded under the domestic doctrine of conversion as already possessing the character of personalty. If, therefore, the owner dies intestate domiciled abroad, it is arguable that he has died entitled not to land, but to pure personalty, and that the relevant intestacy rules are those of the *lex domicilii*, not of the *lex situs*. It is held, however, that his right must be classified as a right to an immovable to be governed by the *lex situs*.²

There is, however, one type of case in which the English judge will probably not make the classification upon the basis

One excep-
tional case

¹ *In re Hoyle*, [1911] 1 Ch. 179, per Farwell J., at p. 185.

² *In re Berchold*, [1923] 1 Ch. 192.

of the *lex fori*. This is where the only possible *lex causae* is either the law of country *X* or the law of country *Y* and both these laws classify the question in the same manner, though in a manner different from that usual in English law.¹

Examples of classification. Illustrations may now be given to show how various causes of action have been classified by English judges.

Whether question matrimonial or testamentary. In the case of *In re Martin, Loustalan v. Loustalan*:²

② A spinster, after making a will, married a man domiciled in England and subsequently died domiciled in France. By English internal law a will is revoked by marriage, but this is not so under French law.

In order to decide whether the will was revoked it was necessary to decide whether this was a matrimonial or a testamentary question, for upon this depended whether the *lex causae* was English or French. Vaughan-Williams L.J. in the Court of Appeal held that the question fell into the category of matrimonial law.

Whether question one of succession or administration. In another case:

A man died domiciled in Ontario, entitled to a large block of shares in an English company. The question was whether the English administrators must sell these shares immediately, as was required by the law of Ontario, or whether, as they desired, they could avail themselves of English law and postpone the sale until a more favourable moment.³

It was necessary, therefore, to determine whether the time at which such a sale must be held is a matter that concerns succession or the administration of assets. If the former it is governed by the *lex domicilii* of the owner at the time of his death, but if the latter, it is regulated by the law of the place where the assets are situated. Farwell J. treated it as a matter of administration and therefore applied English law.

Bequest or gift *inter vivos*. In an earlier case:

K, a man domiciled in Russia but resident in London, made a disposition of movables situated in England to take effect in favour of a certain lady, but only in the event of his death. By English law it constituted an effective *donatio mortis causae* and was valid; by Russian law it was void.⁴

¹ Robertson, op. cit., pp. 76-78; 20 *Columbia Law Review*, 281; 15 *B.Y.B.I.L.* 62.

² [1900] P. 211.

³ *In re Wilks*, [1935] Ch. 645; 17 *B.Y.B.I.L.* 214-15; *In re Kehr*, [1952] Ch. 26.

⁴ *In re Korvine's Trusts*, [1921] 1 Ch. 343. See also the New Hampshire decision in *Emery v. Clough* (1885), 63 N.H. cited Robertson, op. cit., p. 185.

Was this disposition to be classified as a gift *inter vivos* of movables and as such to be governed by the English law of the *situs*, or as a testamentary gift subject to Russian law? It was placed in the former category by Eve J., and, despite a later inconsistent decision,¹ this would appear to be the correct solution.²

(3) *Selection of the lex causae*

Once the legal category has been determined the next step is to apply the correct choice of law rule in order that the *lex causae* may be ascertained. As we have seen, the correct rule will depend upon some connecting factor, such as domicile or the situation of immovables, which relates the question to a definite legal system.

X, for instance, dies intestate domiciled in France, leaving movables in England. Since, therefore, he has been connected by domicile with France, the operative rule for the choice of law is that the question of intestate succession must be governed by French law.

The connecting factor that governs a given situation may well be common to several legal systems, but it occasionally happens that it is not subject to a common interpretation. It may bear a different meaning in different countries. In the hypothetical case given above, for instance, both French and English law agree that *X*'s movables must be distributed in accordance with the law of his domicile at death, but the apparent harmony is disrupted by the fact that the conception of domicile is not understood in precisely the same sense by English and French law. Whether *X* is domiciled in England or France may frequently depend upon whether the English or the French test of domicile is applied.³

Where such a conflict of views arises it is essential to decide which of the various meanings that have been attributed to a particular connecting factor must be applied. It seems obvious on principle that an English court must assign to the conception, say of domicile, that meaning which it bears in English law. The interpretation of the *lex fori* must prevail. To follow any other course would be to abandon the English rule for the

¹ *In re Craven's Estate*, [1937] Ch. 433; criticized by Falconbridge, *Conflict of Laws* (2nd ed.), pp. 644 et seqq.

² Robertson, however, is of opinion that such a gift is *sui generis*, op. cit., p. 185.

³ As, for instance, *In re Annesley*, [1926] Ch. 692, as explained, *infra*, p. 75.

Interpreta-
tion of
'domicil'

choice of law. English law first defines precisely what constitutes that relation with a country which is called domicil and then ordains that when a person is so related to, say, France, certain questions affecting him shall be governed by French law. Such is the appropriate law in English eyes if such is the relation. But if the court were to adopt the French meaning of domicil, according to which the *propositus* perhaps is domiciled not in France, but in England, it would be compelled to apply a system of internal law that is inappropriate according to the policy favoured in this country.¹ Practice here agrees with theory, for it is well established that English courts must ignore all foreign views and tests when required to ascertain the place of a person's 'domicil'.

In the words of Lindley M.R.:

'The domicil of the testatrix must be determined by the English court of Probate according to those legal principles applicable to domicil which are recognized in this country and are part of its law.'²

Interpreta-
tion of
'place of
contract'

Again, the well-established presumption of many legal systems that certain contractual matters are governed by the law of the place where the contract is made raises this problem—According to which law is the place of contract to be determined? In contracts by correspondence, for instance, the rule of English internal law is that the place where the letter of acceptance is posted is decisive, but many other systems prefer the place where the acceptance is received. There is little doubt that an English court, confronted with the problem, would apply the test of English internal law.³ This is also true where it is necessary to determine the place where a tort has been committed.⁴

Classifica-
tion of a
rule of law

At this stage in an action a further difficulty may arise that must be solved by a process of classification, though of a kind different from that discussed above.⁵ It may become necessary to identify the department of law under which some particular legal rule falls in order to ascertain whether it falls within the department with regard to which the *lex causae* is paramount. The *lex causae* has a certain sphere of control, i.e. it governs some, but not all, aspects of the juridical question as classified by the

¹ This is precisely what may happen when what is called the 'total *renvoi* theory' is applied, *infra*, p. 65.

² *In re Martin*, [1900] P. 211, 227. To the same effect, *In re Annesley*, [1926] 1 Ch. 692, 705.

³ *Infra*, pp. 233-4.

⁴ *Monro v. American Cyanamid Corp.*, [1944] K.B. 432, *infra*, p. 293.

⁵ *Supra*, pp. 45-51.

English court in the sense already indicated. Thus, for instance, in an action brought in England for breach of a contract made and performable in France, French law governs matters of formal and essential validity, but all questions of procedure are subject to English law. A French procedural rule is outside the sphere of control of the French *lex causae*. If, therefore, a particular French rule is pleaded and if it is doubtful whether it appertains to procedure or to substance, its true nature must obviously be determined. It must be ignored if it is procedural in character, otherwise it must be applied. Likewise, an English domestic rule is excluded if it appertains to form or substance, but is applicable if it is procedural in nature.

The critical and controversial question is the basis upon which the classification should be made, and illustrations from the authorities will now be given to show how the English judges have dealt with the matter. First, however, it is essential to appreciate that a rule either of the foreign *lex causae* or of English law itself may require to be classified and that the line of reasoning is not necessarily the same in each of these situations.

Subject of classification may be an English or a foreign rule

*Leroux v. Brown*¹ illustrates the process applied to an English rule.

Classification of English rule illustrated by *Leroux v. Brown*

An oral agreement had been made in France by which the defendant, resident in England, undertook to employ the plaintiff in France for a period longer than a year. It was admitted that the substantive validity of the contract was governed by French law and that by this law the contract was valid as to substance. The defendant pleaded, however, that a claim by the plaintiff to recover damages was unenforceable in England, since the Statute of Frauds provided that 'no action shall lie upon a contract not to be performed within the space of one year from the making thereof' unless the agreement or some note or memorandum thereof is in writing signed by the defendant.

This plea required the court to decide whether the statutory rule was of a procedural character. If so it was fatal to the plaintiff, for being a rule of English procedure it was necessarily binding in an English action. Unfortunately, the members of the court took the line of least resistance and, ignoring the larger issues involved, confined their attention to the literal wording of the statute. The reasoning of Maule J., for instance, lacked nothing in simplicity: the statute provides that no action shall be brought upon an agreement not to be performed within a year, unless it is evidenced by a written memorandum; the present agreement is of this nature and there

¹ (1852), 12 C.B. 801.

is no memorandum; 'the case, therefore, plainly falls within the distinct words of the statute'.

Classifica-
tion of
English
rule not
necessarily
to be based
upon inter-
nal law

The defect of this reasoning lay in basing classification upon English internal law instead of upon private international law. The court failed to appreciate that the classification of the statutory rule was required for a conflict of laws case, not for a purely domestic case. The two are not *in pari materia*. The fact that a rule has been classified, or that it ought properly to be classified, in a particular way for a domestic transaction containing no foreign element, does not preclude an entirely different approach when a question of private international law is involved.¹ In this latter type of case, a condition precedent to the classification of an English rule is to ascertain the policy that the rule is designed to serve. Is it, for instance, the policy of the Statute of Frauds that no oral contract of guarantee shall be actionable in England, irrespectively of the law by which it is governed or of the country in which it is performable? Unless this is clearly the policy of the Act, it is an unfortunate application of mechanical jurisprudence to read the words—*no action shall be brought*—in a rigid and literal sense and thus to deprive the plaintiff of a right recognized as valid and enforceable by the law with which it is alone connected. To do this is to strike at the roots of private international law and to defeat one of its fundamental objects. At the present day, when the principles of this part of the law are more mature and its purpose better understood, it is believed that a court, if required to classify a rule of English law, would have regard to the foreign features of the case and would solve the problem more realistically than the Court of Common Pleas did in *Leroux v. Brown*.²

Classifica-
tion of for-
eign rule
illustrated
by *Ogden v.*
Ogden

The classification of a foreign rule, several examples of which are to be found in the Reports, is best introduced by reference to the controversial decision given by the Court of Appeal in *Ogden v. Ogden*.³

A domiciled Frenchman, nineteen years of age, married a domiciled

¹ Cook, *Logical and Legal Bases of the Conflict of Laws*, pp. 211–38.

² Among other examples of the classification of an English rule see *Anderson v. Equitable Assurance of the United States* (1926), 134 L.T. 557, 566; explained Wolff, *Private International Law*, p. 159; *In re Cohn*, [1945] Ch. 5 (the Law of Property Act, s. 184, dealing with *commorientes* classified as part of the substantive, not procedural law; *infra*, p. 59); *In re Priest*, [1944] Ch. 58 (rule that a gift to an attesting witness to a will renders the gift void goes to essential validity, not to form); *In the Estate of Maldonado*, [1954] P. 223, *infra*, p. 57.

³ [1908] P. 46.

Englishwoman in England without first obtaining the consent of his only surviving parent as required by Article 148 of the French code. This article amounted to an express prohibition against the marriage of an infant without consent. The husband obtained an annulment of this marriage in a French court on the ground of want of consent. The wife subsequently went through a ceremony of marriage in England with a domiciled Englishman. In the present action, the latter petitioned for a decree of nullity on the ground that at the time of the ceremony the respondent was still married to the Frenchman.

The factual situation, therefore, raised the question of the validity of the French marriage. There were two connecting factors: the husband was domiciled in France; the marriage was solemnized in England. Guided by these factors, English private international law indicated two rules:

First, the essential validity of the marriage, including the capacity of the husband, must be governed by French law.

Secondly, the formal validity of the marriage ceremony must be tested by English law.

The sphere of control of French law was confined to the essential validity of the union. It followed, therefore, that if the purpose of article 148 was to incapacitate the husband from matrimony unless he complied with its provisions, it affected the essential validity of any marriage that he might contract and should be granted extra-territorial recognition.

So far all is straightforward. Moreover, there is no difficulty if both English and French law agree upon the juridical nature of the consent rule and therefore upon its sphere of application. Complications arise, however, when the true nature of the rule is doubtful. The difficulty then is to discover the reasoning upon which a solution must be reached. Is, for instance, the French classification to be followed blindly? Again, is the English view of an analogous rule in the internal law of England, presuming that one exists, to be adopted? Neither alternative is satisfactory. The rational method is for the English judge to examine the rule in its foreign setting, in order to ascertain its intended scope, the policy by which it has been dictated and the part that it is designed to play by the French legislature. As one learned writer has said:

Foreign rule must be construed in its context and so classified

'In order to characterize the requirements of French law, the English court must examine the concrete provisions of the French law of marriage, not merely the relevant provisions as to parental consent or other alleged grounds of invalidity dissociated or isolated from their

context, but the whole title or group of chapters and articles relating to marriage.¹

Only by this process can full and proper effect be given to the English rule for the choice of law. French law, having been chosen to govern essential validity, must be allowed within reason to determine which of its domestic rules are essential rather than formal. To take the opposite course and to uphold a marriage essentially void under the personal law of the parties by attributing a merely ceremonial character to a rule regarded as essential by that law would not only be the negation of so-called comity, but would incongruously debilitate the English rule for the choice of law. The only reservation is that a foreign classification must be repudiated, if to adopt it will contravene the English doctrine of public policy or be repugnant to some fundamental principle of English law.

In *Simonin v. Mallac*,² decided forty-eight years before *Ogden v. Ogden*, the court was confronted with a different French provision that was obviously not intended to affect capacity in the strict sense of the word.

Two domiciled French persons, desirous of marrying each other without obtaining the parental consent required by French law, crossed to this country and went through a ceremony of marriage in the English form, returning to Paris two or three days later. The wife subsequently petitioned the English court for a decree of nullity on the ground of want of parental consent. By French law, the parties were capable of inter-marriage, but they were required to ask advice of their parents by an *acte respectueux et formel*, and this *acte* had to be repeated each month for three months if the parents were adverse to the marriage. At the end of the fourth month the marriage might take place despite parental disapproval.

It was clear that absence of the consent required by this rule did not render the parties incapable of inter-marriage. The obtaining of consent was in essence an additional formality and, since the form of the ceremony is a matter solely for the *lex loci celebrationis*, the marriage was adjudged to be valid.³

¹ Falconbridge, *Conflict of Laws*, p. 89.

² (1860), 2 Sw. and Tr. 67.

³ *The Sussex Peerage Case* (1844), 11 Cl. and F. 85; *Simonin v. Mallac* (1860), 2 Sw. and Tr. 67; 29 L.J. (N.S.) P. 97; *Steele v. Braddell* (1838), Milw. Eccl. Rep. Ir. 1; *Brook v. Brook* (1861), 9 H.L.C. 193, 216. The so-called *Gretna Green Cases* were to the same effect. Lord Hardwicke's Marriage Act required a marriage to be either by licence or in church after the publication of banns, but in the case of a marriage by licence it also required the consent of the father or guardian of a party under twenty-one. Thus, for the marriage in England

In *Ogden v. Ogden*, however, the relevant French rule was to this effect:

Criticism
of *Ogden v.*
Ogden

'The son who has not reached the age of twenty-five cannot contract marriage without the consent of his father and mother.'

Although it seems almost unarguable that the object of this provision was to impose a total incapacity upon the parties unless they obtained parental consent, the Court of Appeal held the marriage to be valid, since the ceremony had been performed in accordance with the requirements of English law, the *lex loci celebrationis*. The later marriage between the respondent and the Englishman was therefore bigamous. It is submitted that this case was not on the same footing as *Simonin v. Mallac*, and that it is opposed to established principles. For the English court to classify the rule as formal was in effect to infringe the principle that the essential validity of a marriage falls to be determined by the law of the domicile.

As Lord Campbell said in an earlier case:

'It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality or to any of its fundamental institutions.'

The most unfortunate feature of *Ogden v. Ogden* is its suggestion that every rule requiring parental consent to a marriage must be classified as formal.

An outstanding example of a foreign rule being construed in its context with the view of deciding whether it fell within the sphere of control of the foreign *lex causae* is afforded by *In the Estate of Maldonado*,² where the facts were these:

Classifica-
tion illus-
trated by
case of
bona
vacantia

of an infant, the formalities were either banns or licence with consent. The English courts construed this requirement of consent as a formality and held that a marriage solemnized in Scotland without consent was valid, even though the parties had gone there with the sole object of evading the English rule; *Compton v. Bearcroft* (1769), 2 Hag. Cons. 444 N. These runaway marriages have now been rendered impossible by the Marriage (Scotland) Act, 1939, s. 5, which provides that no irregular marriage by declaration *de presenti* or by promise *subsequente copula* shall be valid.

¹ *Brook v. Brook* (1861), 9 H.L.C. 193. The Court of Appeal in *Ogden v. Ogden* refused to recognize the French annulment of the marriage, with the result that the parties possessed the status of married persons in England, but of unmarried persons in France. Under the modern law, however, the French decree of nullity would be recognized as valid; *De Massa v. De Massa*, [1939] 2 All E.R. 150; *Galene v. Galene*, [1939] P. 237; *infra*, p. 381.

² [1954] P. 223.

A person died intestate domiciled in Spain leaving assets to the extent of some £26,000 in England. By Spanish law those assets passed to the Spanish State, since the deceased left no relatives entitled to take them by way of succession.

The English rule for the choice of law applicable to this factual situation is that intestate succession to movables must be determined according to Spanish law as being the *lex domicilii*. Therefore, the sphere of control of Spanish law in the instant case was confined to matters of succession, and the problem was whether the Spanish rule under which the assets passed to the State was to be classified as a rule of succession.

At this point it is pertinent to notice that, though the movables of a deceased owner who dies intestate without leaving recognized successors pass to the State in the great majority of countries, yet the capacity in which the State takes is not uniform throughout the world. In some countries, such as Italy and Germany, it is regarded as an heir taking by way of succession; in others, such as England, Turkey and Austria, it acts in its capacity as the paramount sovereign authority and confiscates the movables as being *bona vacantia*, ownerless goods.¹ If, for example, the deceased dies domiciled in Turkey, the Turkish law, since it governs only questions of succession and since it does not regard the State as a successor, has no say in the matter and movables found in England pass to the Crown.²

The exact words of the Spanish code applicable to the facts of the *Maldonado Case* are, 'The State shall inherit' movables. Moreover, the expert evidence accepted by the court showed that in the Spanish view this was a true case of taking by way of succession, not a case of seizing ownerless goods. Thus the rule under which movables, failing relatives, pass to the State is classified as a rule of succession in Spain but as a confiscatory rule in England, and the short question was whether in an English action this foreign conception of the relationship between the State and the deceased was to prevail with regard to movables found in England. Could the *lex domicilii* dictate to the English court what meaning should be attributed to heirship?

It was argued for the Crown that the English rules of private international law are dominant so far as property in England is concerned, and that no one can be described as a 'successor'

¹ See Wolff, *op. cit.*, p. 157.

² *In the Estate of Musurus*, [1936] 2 All E.R. 1666 (Turkey); *In re Barnett's Trusts*, [1902] 1 Ch. 847 (Austria).

in the eyes of English law unless he has a personal *nexus* with the deceased, a connexion which certainly cannot be claimed by a sovereign State to which the property passes.

This argument, however, did not prevail. It was held, both by Barnard J. and by the Court of Appeal, that the Spanish law of the domicile, which admittedly governed all questions of intestate succession, must be allowed to determine the sense and scope of the term 'succession'.

'In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted', said Barnard J., 'the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion.'¹

Further, the alleged requirement of a personal *nexus* between the deceased and the heir was dismissed as a fallacy, for in the words of Jenkins L.J.:

'The heir or successor is surely the person, whether related to the deceased or not, who under the relevant law is entitled to inherit or to succeed.'²

Finally, there was nothing contrary to public policy or repugnant to English law in allowing a sovereign State to take property in the capacity of an heir.

In an earlier case, Uthwatt J., when required to decide in a case of *commorientes* whether the relevant rule of the German law of the domicile was to be applied as affecting substance or rejected as being procedural in nature, followed the same process of construing the rule in its foreign setting and in the result accepted the German classification.³ In the later case of *Adams v. National Bank of Greece and Athens*,⁴ Diplock J. found it necessary to decide whether a certain Greek decree related to status or to the discharge of contractual liabilities, and he was insistent that for this purpose he was bound 'to look at the substance of the law, not merely at its form'.⁵

There is no need at this stage to discuss other cases in which English courts have classified foreign rules, since examples will appear from time to time in the course of the following pages.⁶

¹ [1954] P., at p. 231.

² *Ibid.*, at p. 249.

³ *In re Cohn*, [1945] Ch. 5.

⁴ [1958] 2 Q.B. 59.

⁵ *Ibid.*, at p. 75. For the later history of this case, see *infra*, pp. 208-9.

⁶ *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877, *infra*, p. 696 (whether a French rule affected procedure or the substantive law of tort);

Classifica-
tion of rule
of com-
morientes

4. Application of the *lex causae*

What is
the scope
of the *lex*
causae?

This chronology of an action raising a question of private international law has now reached the final stage. Nothing remains but for the judge to apply the *lex causae*. At first sight this seems to be a comparatively simple task, since presumably all that is required is to give effect to the appropriate internal law rule of the *lex causae*. If, for instance, a man has died intestate leaving movables in England, it seems obvious that if he died domiciled in England the rules of distribution contained in the Administration of Estates Act must be applied, and equally obvious that if his last domicil was in Italy effect must be given to the equivalent rules of the Italian civil code. But the life of the law has not always been the obvious. To appreciate this fact, however, it is necessary to consider the matter according as the *lex causae* is English or foreign.

(A) Construction of the *lex causae* when it is English.

Internal
law applied
if *lex*
causae is
English

In this case, the obvious represents the law. It is the appropriate rule of English internal law that must be applied to the case. Thus if, in the example given above, the deceased died domiciled in England, the scheme of distribution imposed by the Administration of Estates Act must be followed. There can be no question of paying any further regard to the private international law of England. The function of that department of the law is purely selective and its selection of English law as the *lex causae* must perforce refer to English internal law, i.e. to the rules applicable to a purely domestic situation having no foreign complexion.

(B) Construction of the *lex causae* when it is foreign.

1. The question theoretically considered

The prob-
lem that
arises if *lex*
causae is
foreign

The selection of a foreign *lex causae* creates a more complex situation. The difficulty is to determine the sense in which the *lex causae* must be understood. If, for example, the English rule for the choice of law refers to the law of Italy, what meaning must be attributed to the 'law of Italy'? The difficulty is

In re Doetsch, [1896] 2 Ch. 836 and other similar cases, *infra*, p. 696 (whether a rule regulating the order in which parties must be sued affected procedure or substance); *Huber v. Steiner* (1835), 2 Bing. N.C. 202 and other similar cases, *infra*, p. 688 (whether a statute of limitation goes to substance or procedure); *Huntington v. Attrill*, [1893] A.C. 150, *infra*, p. 140 (whether a New York statutory rule was penal or remedial).

not obvious at first sight, and we may lament in passing that it has become so controversial, but it can be demonstrated by two simple illustrations.

X, a British subject, dies intestate, domiciled in Italy, and an English Court is required to decide the mode in which his movables found in England shall be distributed. The difficulty illustrated

It is obvious in theory that the mode of distribution should be the same everywhere, in the sense that no matter what national court deals with the matter there ought to be universal agreement as to what particular legal system shall indicate the actual beneficiaries. The fact, however, that there are different systems of private international law militates against this ideal solution. Thus, according to the English rules for the choice of law the question of intestate succession to movables is governed by Italian law as being the *lex domicilii* of *X* at the time of death, but according to the Italian rules it must be referred to the law of England as being the *lex patriae*. In the case given above, for instance, an English court has no option but to refer the question of succession to Italian law, while an Italian judge if seised of the matter is under an equal necessity to apply the national law. The English judge, of course, is exclusively governed by his own system of private international law, and must therefore decide that *X*'s goods shall be distributed according to Italian law. Despite this obvious conclusion, however, we are still confronted with the question—what is meant by Italian law? Does it mean Italian internal law, i.e. the rules enacted by the Italian Code analogous to section 46 of the Administration of Estates Act, 1925, which regulate the distribution of an intestate's property? Or does it mean the whole of Italian law, including in particular the rules of private international law as recognized in Italy? If the latter is the correct meaning, a further difficulty is caused by the difference between the English and Italian rules for the choice of law, for upon referring to Italian private international law we find ourselves referred back to English law. This being so, the question is whether we are to ignore the divergent Italian rule or to accept the reference back that it makes. If we accept the reference back, are we to stop finally at that point and to distribute *X*'s goods according to the Administration of Estates Act?

The difficulty may arise in an action for breach of contract. For instance:

Difficulty
further
illustrated

By a contract made at Hamburg in German form containing expressions peculiar to German law, a merchant, resident in Hamburg, agrees to sell goods f.o.b. Hamburg to a London merchant. The purchaser brings an action in England to recover damages for short delivery.

There is no doubt that private international law as established in this country requires the rights of the parties to be determined according to German law. But is German law in this connexion to be understood as excluding or including its rules for the choice of law? If it is taken to include those rules, the English court may possibly find that Germany has a different principle of private international law according to which the merits of the dispute fall to be decided by English law.

Possible
solutions

When a case is complicated in this fashion, owing to a difference in the private international law of two countries, there are three possible solutions. These are as follows:

The judge who is seised of the matter and who is referred by English private international law to, say, the law of France, may

- (i) take 'the law of France' to mean the internal law of France; *or*
- (ii) decide the case on the assumption that the doctrine of *renvoi* is recognized by English law; *or*
- (iii) take 'the law of France' to mean the law which a French judge would administer if he were seised of the matter.

These possible courses will now be discussed with the view of showing that, at least in certain types of case, the third solution has rightly or wrongly been frequently adopted by the judges.

I. Court
may look
to internal
law only

The first solution, and the one which in the present submission is in general correct and desirable, is to read the expression 'the law of a country' as meaning only the internal rules of that law. The following words of an eminent jurist would seem to represent the sensible view:

'If England chooses the law of a person's domicile as the best one to apply to a certain relationship, does she mean the ordinary law for ordinary people, his friends and neighbours, in that domicile? Or does she include that country's rules for the choice of law? Common sense could answer that the last alternative is absurd and otiose: a rule for the choice of an appropriate law has already been applied, namely our own. To proceed to adopt a foreign rule is to decide the same question twice over.'¹

This would seem to be in accord with the intention of the *propositus*. If, for instance, a man voluntarily abandons England

¹ Baty, *Polarized Law*, p. 116.

and acquires a domicile in Italy where he permanently resides until his death many years later, the natural inference is that he willingly submits himself to the internal law of that country.

It has been said that this represents the established view throughout the United States of America.¹ It has been definitely adopted in at least two early English decisions, one by a court of first instance,² the other by the Privy Council.³ It is, and always has been, unconsciously adopted in a multitude of decisions.⁴

The second solution is to apply the doctrine of *renvoi*, which³ Court may adopt the doctrine of *renvoi* is to this effect: If a judge seised of a case in country *A* is referred by his own rule for the choice of law to the 'law' of country *B*, but the rule for the choice of law in *B* refers such a case to the 'law' of *A*, then the judge in *A* must apply the internal law of his own country. The operation of this famous but regrettable doctrine, which demands that a reference to the law of a country shall mean a reference to the whole of its law, including its private international law, is best explained by the example already given:

X, a British subject, dies intestate, domiciled in Italy, and an English court is required to decide the mode in which his movables found in England shall be distributed.

The English court is directed by its own private international law to refer this question of distribution to Italian law as being the *lex domicilii* of the deceased. When, however, it examines the provisions relating to the conflict of laws contained in the Italian Code, it finds that in the case of succession to movables they prefer the *lex patriae* of the deceased to his *lex domicilii*, and that if an Italian court had been seised of this matter in the first instance it would have resorted to the law of England. Thus, the English court finds itself referred back to English law as being the law of *X*'s nationality. There is a *renvoi* or remission to English law.

If the court accepts this remission and distributes the property according to the Administration of Estates Act, it is true^{Operation of *renvoi*}

¹ 10 *Columbia Law Review*, 344. It was adopted by the Surrogate's Court of New York county in *In re Tallmadge* (1919), 109 Misc. Rep. 696; Lorenzen, p. 318, but repudiated by the same court in *In re Schneider's Estate* (1950), 96 N.Y. Supp. (2d) 652 (Surr. Ct.) where, however, the question concerned foreign land. For a full discussion of these two cases see Falconbridge, 6 *Vanderbilt Law Review*, 708 et seqq.

² *Hamilton v. Dallas* (1875), L.R. 1 Ch.D. 257.

³ *Bremer v. Freeman* (1857), 10 Moo. P.C. 306.

⁴ *Infra*, p. 83.

to say that the doctrine of *renvoi* is part of English law. Italian law has been allowed, not to give a direct solution of the problem under consideration, but to indicate what legal system shall furnish the final solution. Where the court that is seised of the matter accepts the remission and applies its own municipal law it recognizes the doctrine in its simplest form. *Renvoi*, properly so called, is best exemplified by the well-known decision of the French Cour de Cassation in *Forgo's Case*.¹

Doctrines
illustrated
by a
French
decision

✓ *Forgo*, a Bavarian national, died intestate at Pau, where he had lived since the age of five. The question before the French court was whether his movables in France should be distributed according to the internal law of France or of Bavaria. Collateral relatives were entitled to succeed by Bavarian law, but under the Code Napoléon the property passed to the French Government to the exclusion of collaterals. French private international law referred the matter of succession to Bavarian law, but Bavarian private international law referred it to French law. The Cour de Cassation in France accepted the remission and applied the provisions of the Code Napoléon.

Doctrines
may appear
in two
forms

Where, as in *Forgo's Case*, there are only two legal systems concerned—where the reference is merely from country *A* to country *B* and back from *B* to *A*—the doctrine of *renvoi* appears in its simplest form. It is called *Rückverweisung* by German jurists. A case may occur, however, where the reference is from *A* to *B*, and from *B* to *C*. Suppose, for instance, that a contract for the sale of goods to be delivered at Rome has been made in Italy between an Italian seller and a French buyer and that the question before the English court is whether the Frenchman is of full capacity. The rule of English private international law applicable to such a case is that capacity must be determined by Italian law, but Italian private international law refers the question to French law as being the *lex patriae*. This form of reference from *B* to *C* is called *Weiterverweisung* in Germany. Perhaps the best English equivalents of the two forms are *remission* and *transmission*.²

¹ 10 *Clunet* (1883), 64.

² The literature on the subject is immense; among the contributions in English see: Bate, *Notes on the Doctrine of Renvoi*; Mendelssohn-Bartholdy, *Renvoi in Modern English Law*; Rabel, i. 70 et seqq.; 10 *Columbia Law Review*, 190, 327; 24 *L.Q.R.* 133 and 26 *L.Q.R.* 91; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 137–263; 27 *Y.L.J.* 509 and 31. 191; 31 *Harvard Law Review*, 523 and 51. 1165; 16 *B.Y.B.I.L.* 36 and 18. 32; 87 *University of Pennsylvania Law Review*, 1; 6 *Vanderbilt Law Review*, 708; 29 *Tulane Law Review*, 379 et seqq.; Dicey, *Conflict of Laws*, pp. 64–84; Morris, *Cases on Private International Law* (3rd ed.), pp. 25–27; 74 *L.Q.R.* 493. Especial reference should be made to Wolff, p. 186.

This particular doctrine of *renvoi*, whether in the form of remission or transmission, which is now generally called *partial* ^{This form of *renvoi* not part of English law} or *single renvoi*,¹ is not part of English law.² That is to say, if English law refers a matter to the *lex domicilii* and if the latter remits the question to English law, the judge does not automatically accept the remission and apply English internal law. He does not act as the French court did in *Forgo's Case*. It seems unnecessary, therefore, to elaborate the objections to which the doctrine is open.

The third possible solution is to adopt what may be called the *foreign court theory* or the doctrine of *double renvoi*³ or *total renvoi*,⁴ or 'the English doctrine of *renvoi*'. This demands that an English judge, who is referred by his own law to the legal system of a foreign country, must apply whatever law a court in that foreign country would apply if it were seised of the matter. The question, for instance, concerns the testamentary dispositions of a British subject who dies domiciled in Belgium, leaving assets in England. A Belgian judge dealing with this matter would be referred by his private international law to English law, but he would then find that the case was remitted to him by English law. Evidence must therefore be adduced in the English proceedings to show what he would in fact do. He might accept the remission and apply his own internal law, and this would be his course if *renvoi* in the *Forgo* sense (*partial renvoi*) is recognized in Belgium, or he might reject the remission and apply English internal law. Whatever he would do inexorably determines the decision of the English judge. The present solution, as described by Sir H. Jenner over a hundred years ago, requires the court to 'consider itself sitting in Belgium under the particular circumstances of the case'.⁵ The same judge said in another passage:

'The court sitting here decides from the persons skilled in that [Belgian] law, and decides as it would if sitting in Belgium.'⁶

¹ Dicey, p. 66.

² *In re Askew*, [1930] 2 Ch. 259, 268. 'An English court can never have anything to do with it [*renvoi*], except so far as foreign experts may expound the doctrine as being part of the *lex domicilii*', per Maugham J.

³ Rabel, i. 76.

⁴ Dicey, p. 67; Falconbridge, op. cit., p. 170.

⁵ *Collier v. Rivaz* (1841), 2 Curt. 855, at p. 859, per Sir Herbert Jenner.

⁶ *Ibid.*, at p. 863. The doctrine is ambiguous in the sense that the grounds upon which the English judge must arrive at the Belgian decision are far from clear. Must he reason on the basis of the actual circumstances of the case, especially the presence of the assets in England? Or, must he reason on a false assumption, namely, that the assets are in Belgium? There is judicial authority for both views. See Dobrin, 15 *B.Y.B.I.L.* 37-45.

Variable operation of the doctrine If this third solution is adopted, it is vital to realize that the decision given by the English judge will depend upon whether the doctrine of *partial renvoi* is recognized by the particular foreign law to which he is referred. The doctrine, for instance, is repudiated in Italy but recognized in France. Therefore, if the issue in England is the intrinsic validity of a will made by a British subject domiciled in Italy, the judge, if he is to make an imaginary judicial journey to Italy, will reason as follows:

An Italian judge would refer the matter to English law, as being the national law of the *propositus*. English law remits the question to Italian law as being the *lex domicilii*.

Italian law does not accept this remission, since it repudiates the *partial renvoi* doctrine.

Therefore an Italian judge would apply English internal law.¹

A French domicile, however, would produce the opposite result, since a court sitting in France would accept the remission from England and would ultimately apply French internal law.²

Advocates of the foreign court doctrine This third solution does not lack support in England and North America. Certain English decisions, which will be discussed later, may be cited in its favour; throughout his life Dicey maintained its truth; the learned editor of his fifth edition was equally strong in advocating its merits;³ and a modern American jurist sums up his conclusions in these words:

'When a court is referred by its own conflicts rule to a foreign law, it should, as a matter of course, look to the entire foreign law as the foreign court would administer it.'⁴

The doctrine is of doubtful value Before estimating the value of the English decisions, therefore, it is appropriate to consider a few of the objections that may be raised to this foreign court doctrine. The burden of the following pages is that it is objectionable in principle, is based upon unconvincing authority and cannot be said to represent the general rule of English law. It is submitted that, subject to certain well-defined exceptions, an English judge, when referred by a rule for the choice of law to the legal system of a foreign country, is not required to consider whether the *renvoi* doctrine is recognized by the private international law of either country,

¹ *In re Ross*, [1930] 1 Ch. 377; *infra*, p. 78.

² *In re Annesley*, [1926] Ch. 692, *infra*, p. 75.

³ Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 863 et seqq.; 24 *Journal of Comparative Legislation*, 69.

⁴ Griswold, 51 *H.L.R.* 1183.

but must administer the internal law of the legal system to which he has been referred.

The following objections, amongst others, may be directed against the doctrine:

(a) *The foreign court doctrine does not necessarily ensure uniform decisions.* The laudable objective of those who favour the doctrine either of partial or of total *renvoi* is to ensure that the same decision shall be given on the same disputed facts, irrespective of the country in which the case is heard. In truth, however, the doctrine of *renvoi*, in whatever form it is expressed, will produce this uniformity only if it is recognized in one of the countries concerned and rejected in the other—not if it is recognized in both. If, for example, the *lex domicilii*, to which the English judge is referred, ordains that the case is to be decided exactly as the national (English) court would decide it, what is the judge to do upon finding that by English law his decision is to be exactly what it would be in the country of the domicile?¹ Where is a halt to be called to the process of passing the ball from one judge to another? There is no apparent way in which this inextricable circle can be broken—this international game of lawn tennis be terminated.

Uniformity not attained if the doctrine is accepted in both countries

'No logical reason can be given why if in the one case Massachusetts law be taken to refer to the French conflict-of-laws rule, the latter should not in turn be held to refer back again to the Massachusetts conflict-of-laws rule, and so on *ad infinitum*.'²

Uniformity will, indeed, be attained if the *lex domicilii* repudiates the doctrine of total *renvoi*, i.e. if, instead of seeking guidance from a foreign judge, it categorically provides that the national (English) law shall govern the matter, for in this case English internal law will apply and harmony will prevail. It is true that the foreign court doctrine is apparently unrecognized in countries outside the British Commonwealth, but none the less it is difficult 'to approve a doctrine which is workable only if the other country rejects it'.³ The fact is, of course, that uniformity of decisions is unattainable on any consistent principle with regard to matters that are determined in some countries by the *lex patriae*, in others by the *lex domicilii*.⁴

¹ 18 *B.Y.B.I.L.* 37.

² Schreiber, 31 *H.L.R.* 533.

³ Lorenzen, 50 *Y.L.J.* 753.

⁴ Rabel denies this. He says that if the world is split into two contradictory systems, some applying the principle of domicile, others the principle of nationality, to govern certain matters, then it stands to reason that *renvoi*, which supplies a

Uniformity
may be
lost, since
theory does
not apply
to classi-
fication

A second obstacle to uniformity of decisions is that the foreign court doctrine does not require, in fact does not allow, the English judge to don the mantle of his foreign colleague until he himself has classified the cause of action.¹ But to delay his transmigration so long may well result in a decision that would have been incomprehensible to the hypothetical foreign judge.

If, for instance, the English judge classifies the juridical question as one concerning the essential validity of a will left by a British subject who died domiciled in Italy, he will defer to the decision that would be given in such a case by an Italian judge. In the result he will apply English internal law.

But suppose that an Italian judge would have classified the question as one concerning the marital rights of the testator and his wife, who were both domiciled in Germany at the time of their marriage. In these circumstances he would have referred to the internal law of Germany as being the law of the matrimonial domicile.²

On this hypothesis, there is nothing but discord between what the English judge has done and what his Italian counterpart would have done.

Admittedly, it would be heresy for the English judge to classify the cause of action in a manner radically opposed to the conceptions of his own law, but nevertheless it would seem that the foreign court doctrine, if it is to be consistent, should not arbitrarily fix the stage at which alien intervention is to occur, but should go the whole way and require every phase of the action, except procedure, to be tested according to the foreign standards.

The
doctrine
conflicts
with the
object of
a rule for
the choice
of law

(b) *The foreign court doctrine signifies the virtual capitulation of the English rules for the choice of law.* Stripped of its verbiage, the doctrine involves nothing less than a substitution of the foreign for the English choice-of-law rules. In the case, for instance, of the British subject who dies intestate domiciled in Italy, the English rule selects the law of Italy as the *lex causae*, but the equivalent Italian rule selects the law of England. When, therefore, the English judge defers to the decision that an Italian judge would have given, he applies the internal law of England and thus shows a preference for the Italian selective rule. The

reasonable *modus vivendi*, cannot be applied in the same manner by the two antagonistic groups and at the same time reach uniformity. 'The English method in turn is not to be observed by courts following the nationality principle. Theorists should not demand schematic symmetry just to obtain an *argumentum ad absurdum*.' *The Conflict of Laws, A Comparative Study*, i. 77.

¹ As to this see *supra*, pp. 45 et seqq.

² Cp. the *Maltese Marriage Case*, *supra*, p. 46.

English rule is jettisoned, since it does not meet with the approval of the law-maker in Italy. This, indeed, is the apotheosis of comity. In fact, it comes perilously near to a surrender of legislative sovereignty.¹ Moreover, a rule for the choice of law is essentially selective in nature,² and that it should have no other effect than to select another and contradictory rule of selection savours of incompatibility and paradox.

One acute critic, indeed, finds nothing strange in this surrender to a foreign rule for the choice of law.³ He denies that there is any logical reason why an English rule of this nature should not be taken to indicate the private international law of a foreign country rather than its internal law. To regard a reference to the *lex domicilii* as a reference to the internal law is, he says, merely to beg the question. This argument, it is submitted, ignores both the nature and genesis of a rule for the choice of law. The truth is that such a rule is based upon substantial grounds of national policy. It represents what appears to the enacting authority to be right and proper, having regard to the sociological and practical considerations involved. The English principle for instance, that an intestate's movables shall be distributed according to the law of his last domicile is founded on the reasoning that rights of succession should in the nature of things depend upon the law of the country where the deceased established his permanent home. Having voluntarily become an inhabitant of the country, it is the view of English law that in this matter he should be on the same footing as other inhabitants. Moreover, the natural inference is that he submits himself to the law which binds his friends and neighbours. This would seem to be his presumed intention. Thus, if the reference to the *lex domicilii* is regarded as a reference to whatever internal system the private international law of the domicile may choose, then not only is the deliberate policy of English law reversed, but the probable intention of the *propositus* is ignored. Indeed, his expectations may be flouted. He may, for instance, have refrained from making a will, having been content with the local rules governing intestacy, the purport of which it will have been a simple matter for him to ascertain. A quite different set of rules, however, may operate if the private international law of his domicile is to have effect.

The doctrine conflicts with the policy of a rule for the choice of law

¹ See the dissenting judgment of Taschereau J. in the Canadian case of *Ross v. Ross* (1894), 25 Can. S.C.R. 307. See Schreiber, 31 *H.L.R.* 561-4.

² Schreiber, *op. cit.*, p. 533.

³ Griswold, 51 *H.L.R.* 1176-8.

✓(c) *The foreign court doctrine is difficult to apply.* The doctrine obliges the English judge to ascertain as a fact the precise decision that the foreign court would give. This confronts him with two difficulties.

First, he must ascertain what view prevails at the moment in the foreign country with regard to the doctrine of *partial renvoi*.

Secondly, where the foreign rule for the choice of law selects the national law of the *propositus*, the judge must ascertain what is meant by national law.

Difficulty of ascertaining foreign view of *renvoi* As we have already seen, the *lex causae* that emerges from an application of the doctrine depends *inter alia* upon whether the doctrine of the *partial renvoi* is recognized by the *lex domicilii*.¹ If the court of the domicil would accept the remission made to it by English law, it would determine the case according to its own internal law; otherwise it would apply the internal law of England. This dependence of the rights of the parties upon the attitude of the *lex domicilii* to the *renvoi* doctrine is a cause of acute embarrassment. There are few matters upon which it is more difficult to obtain reliable information. In Continental countries the views of the jurists upon the doctrine not only change from year to year but are frequently divergent at any one time, and little reliance can be placed upon the decisions of the courts, for, owing to the absence of the principle *stare decisis*, what is decided by one court today may be disavowed by another tomorrow.² One result is that an undue influence is possessed by the expert witness. He may be an over-zealous partisan of one school or the other, or, though learned in the internal law of the domicil, he may be unacquainted with the niceties of the *renvoi* doctrine.³ 'It is surprising', says one writer, 'to see how often judgments of the German Supreme Court which are freely criticized in Germany as bad law and are in contradiction with the authorities there, are quoted by expert witnesses as if they constituted the law of the land.'⁴ The result is that the English judge may be confronted with a somewhat arduous and invidious task, as witness the following remarks of Wynn-Parry J. in a modern case:

'It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either to this country or to Spain the relevant law of Spain as it would be expounded

¹ *Supra*, p. 63.

² See *per* Maugham J., *In re Askew*, [1930] 2 Ch. 259, 277-8.

³ 19 *Canadian Bar Review*, 316.

⁴ Mendelssohn-Bartholdy, *Renvoi in English Law*, p. 29, note 1.

by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction.¹

The second difficulty that may arise is to ascribe a definite meaning to the expression 'national law'. When the private international law of the country in which the English judge is presumed to sit selects the nationality of the *de cujus* as the connecting factor, it becomes necessary to correlate the national law with some precise system of internal law by which the issue before the court may be determined. This is a simple matter when the *de cujus* is a national of some country, such as Sweden, which has a unitary system of territorial law.² There is a single body of internal law applicable throughout the territory known as Sweden. The position is far different where the country of nationality comprises several systems of territorial law, as is true of the British Empire and the United States of America. What, for instance, is the national law of a British subject? The expression is, of course, meaningless, for the law that governs a British subject in personal matters varies according to the unit of the Empire or to the foreign country in which he is domiciled. It is one system in England, another in Scotland, and so on. The case, *In re O'Keefe*,³ will serve to illustrate both the nature of the difficulty and the speciousness of the foreign court doctrine. The facts were these:

The question before the English court was the mode in which the movables of *X*, a spinster who died intestate, were to be distributed. *X*'s father was born in 1835 in what is now called Eire, but at the age of 22 he went to India, and except for various stays in Europe lived there throughout his life and died in Calcutta in 1885. *X* was born in India in 1860; from 1867 to 1890 she lived in various places in England, France and Spain; but in 1890 she settled down in Naples and resided there until her death 47 years later. About the year 1878 she had made a short tour in Eire with her father. She never lost her British nationality, but it was held that she had acquired a domicile in Italy.

The law selected by English private international law to govern

¹ *In re Duke of Wellington*, [1947] Ch. 506, 515; *infra*, p. 82.

² For a stimulating *exposé* of the present difficulty see Falconbridge, *Conflict of Laws* (2nd ed.), pp. 202-16. See also a note by J. H. C. Morris, 56 *L.Q.R.* 144-7.

³ [1940] Ch. 124.

the question of distribution was, therefore, the *lex domicilii*. An Italian judge, however, had he been seised of the case, would have been referred by the Italian Civil Code to the national law of *X*. He would have rejected any remission made to him by the national law, since the *partial renvoi* doctrine is not adopted in Italy. The Civil Code uses the general expression 'national law' and fails to define what this means when the country of nationality contains more than one legal system. Which system of internal law, then, out of those having some relation to *X*, would be regarded by an Italian court as applicable? The issue raised by the summons was whether it was the law of England, of Eire or of British India. Which of these systems would be selected by a court in Italy? The expert witnesses agreed that it would be the law of the country to which *X* 'belonged' at the time of her death. She certainly did not 'belong', whatever that may mean, to England in the sense of attracting to herself English internal law, for she had spent no appreciable time in the country, and, as Pollock once remarked, English law has no especial predominance in the British Empire.¹ She might perhaps, by reason of her birth in Calcutta, be regarded as belonging to India, though she had not been there for seventy years. The man on the Clapham bus might even be excused for thinking that she most properly belonged to the country where she had continuously spent the last forty-seven years of her life.² Crossman J., however, would have none of these. He reverted to *X*'s domicil of origin, and held that she belonged to Eire because that was the country where her father was domiciled at the time of her birth. In the result, therefore, the succession to her property was governed by the law of a country which she had never entered except during one short visit some sixty years before her death; which was not even a separate political unit until sixty-two years after her birth; of whose succession laws she was no doubt profoundly and happily ignorant; and under the law of which it was impossible in the circumstances for her to claim citizenship. The convolutions by which such a remarkable result is reached are interesting. First, the judge is referred by the English rule to the *lex domicilii*, which in the instant case means the law of the domicil of choice;

¹ 25 *L.Q.R.* 157; also an editorial note in *In re Askew*, [1930] 2 Ch. at p. 269.

² Morris points out (56 *L.Q.R.* 146) that the summons did not suggest Italian law as a possible choice, and he assumes that the decision is no authority against the view that the internal law of the domicil should have been applied.

then he bows to the superior wisdom of a foreign legislator and allows the *lex domicilii* to be supplanted by the *lex patriae*; then, upon discovering that the *lex patriae* is meaningless, he throws himself back upon the domicil of origin, and thus determines the rights of the parties by a legal system which is neither the national law nor the *lex domicilii* as envisaged by the English rule for the choice of law.

Comment is surely superfluous. A decision that is so out of touch with the realities of life and so calculated to defeat the expectations of the deceased is scarcely a good advertisement for the foreign court doctrine.¹

2. *The English decisions*

The following cases are generally cited in support of the foreign court doctrine.

Collier v. Rivaz.² The facts here were as follows:

Collier v. Rivaz:
formal
validity of
a will

Facts:-

A British subject, who according to English law was domiciled in Belgium at the time of his death, had executed seven testamentary instruments, a will and six codicils. The will and two of the codicils had been executed in accordance with the formalities required by Belgian internal law. The remaining four codicils, though formally valid according to the Wills Act, 1837, were not made in the form required by Belgian internal law. According to the law of Belgium the testator had never acquired a domicil in that country, since he had not obtained the necessary authorization from the Government. The question was whether the instruments could be admitted to probate in England.

Sir Herbert Jenner, after propounding the theory that he must sit as a Belgian judge, admitted the will and two codicils to probate because they satisfied the formalities of the internal law of the country in which the testator was domiciled in the English sense; and he extended the same indulgence to the remaining codicils on the ground that, since the testator had not acquired a domicil in Belgium in the Belgian sense, a judge in Brussels would apply Belgian private international law, under which the formal validity of the instruments would be tested by English internal law.

¹ The difficulty of identifying the law to which a British national is subject was ignored in *In re Ross* (*infra*, p. 78) and *In re The Duke of Wellington* (*infra*, p. 82). In both cases English law was chosen without argument.

² (1841), 2 Curt. 855.

The *ratio decidendi* incapable of general application

This decision is open to many criticisms.¹ It is obvious that when a rule for the choice of law selects a particular legal system as the one to govern a given question, it is necessary to decide whether this means the internal law or the private international law of the selected system. It cannot mean both, for the private international law may indicate some other legal system, the internal law of which differs from the internal law of the selected system. If the question in *Collier v. Rivaz* had been, not the formal, but the intrinsic, validity of the testamentary instruments, if, for instance, some of them had been lawful by English internal law but unlawful by Belgian internal law, while others had been lawful in Belgium but unlawful in England, it would have been impossible to uphold them in their totality. Sir H. Jenner, however, had it both ways. He held that the formal validity of a will cannot be denied if it satisfies either the internal law or the private international law of the selected legal system. There is much to be said for this benevolent rule in the one case of formal validity, since it is obviously desirable that the intention of a testator, clearly expressed and not intrinsically objectionable, should be respected if reasonably possible. What is impossible is that the rule should be allowed a general operation.²

Moreover, the decision is flatly contradictory to *Bremer v. Freeman*,³ where on similar facts the Privy Council held that the *de cuius* was domiciled in France and that the will was formally invalid. The same result was reached in *Hamilton v. Dallas*,⁴ a case of intestacy.

Frere v. Frere.⁵ In this case:

A British subject domiciled in Malta made a will in England, which was formally valid by English law but void by the law of Malta, since it did not bear the signatures of five witnesses.

¹ See especially: Abbot, 24 *L.Q.R.* 143; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 143-5, 151-2; Morris, 18 *B.Y.B.I.L.* 43-44; Mendelssohn-Bartholdy, *Renvoi in English Law*, pp. 58-64. The decision is described by Falconbridge as the *fons et origo mali* in English Conflict of Laws, 53 *L.Q.R.* 552. Lord Wensleydale in *Bremer v. Freeman* (1857), 10 Moo. P.C. 306, 374, said, 'The case was not regularly contested, which makes it of less authority. It was a mere question on the parole evidence of the Belgian law which was very short and unsatisfactory.'

² In the goods of *Lacroix* (1877), 2 P.D. 94, was another case where the English judge seems to have applied both the private international law and the internal law of the domicil. For a neat statement of the facts and the effect of the decision see J. H. C. Morris, 18 *B.Y.B.I.L.* 42, note 4. It was concerned with formal validity.

³ (1857), 10 Moo. P.C. 306; *infra*, pp. 563, 568.

⁴ (1875), L.R. 1 Ch. D. 257; 18 *B.Y.B.I.L.* 45.

⁵ (1847), 5 *Notes of Cases in the Ecclesiastical and Maritime Courts*, 593.

(ii) *Frere v. Frere*: formal validity of a will

According to English private international law, the formal validity of this will was a matter for Maltese law as being the *lex domicilii* of the testator. An expert witness, who admitted that he knew of no express decisions on the question, expressed the opinion that such a will made outside the island by a person either of Maltese or of foreign domicil or nationality would not be adjudged void by the local courts, provided that it satisfied the formalities required by the *lex loci actus*. Sir H. Jenner-Fust¹ merely repeated the expert opinion and said: 'Then, can I say that this will is invalid according to the law of Malta? Certainly not.' The decision, therefore, is one where the reference made by the English rule for the choice of law to the *lex domicilii* was regarded as a reference to the private international law of the domicil. Though unsound in principle, it again exemplifies an indulgence to testators that is not undeserving of sympathy.

The next case, *In re Annesley*,² was concerned with the intrinsic validity of a will.

*In re (ii).
Annesley:
intrinsic
validity of
a will* ✓

Facts: An Englishwoman was domiciled at the time of her death in France according to the principles of English law, but was domiciled in England in the eyes of French law, since she had never obtained the authorization of the Government which, before 1927, was necessary for the acquisition of domicil.³ Her testamentary dispositions were valid by English internal law, but invalid by French internal law, since she had failed to leave two-thirds of her property to her children.

Russell J. held that the validity of the dispositions must be determined by French law. His actual decision, therefore, was in accordance with the view that a reference to the law of a given country is a reference to its internal law,⁴ but he did not reach his conclusion in this simple fashion. He preferred the foreign court theory. Two passages indicate what was in the learned judge's mind.

'I accordingly decide that the domicil of the testatrix at the time of her death was French. French law accordingly applies, but the question

¹ Sir H. Jenner had assumed the name of Fust in 1842.

² [1926] Ch. 692.

³ Article 13 of the French civil code provided that a foreigner authorized by the Government to establish his domicil in France should enjoy all civil rights there, but the benefit of this authorization ceased at the end of five years if the foreigner had not applied for naturalization or if his application had been dismissed. Therefore a person might well be domiciled in France according to English conceptions but not domiciled there in the eyes of French law. Article 13, however, was repealed by a law of 10 August 1927. See 46 *L.Q.R.* 472-4; 19 *Journal of Comparative Legislation*, 239-44.

⁴ *Supra*, pp. 62-63.

remains: What French law? According to French municipal law, the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality refers the question back to French law, the law of the domicile; and the question arises, will the French law accept the reference back, or *renvoi*, and apply French municipal law?¹

'I have come to the conclusion that I ought to accept the view that according to French law the French courts, in administering the movable property of a deceased foreigner who, according to the law of his country, is domiciled in France, and whose property must, according to that law, be applied in accordance with the law of the country in which he was domiciled, will apply French municipal law, and that even though the deceased had not complied with Article 13 of the Code.'²

Criticism
of the deci-
sion. Judg-
ment am-
biguous

This language bristles with difficulties.

In the first place the meaning of the expression 'French municipal law', which appears twice in the opening passage, is far from clear. The inference, however, from later parts of the judgment is that at the beginning of the sentence it refers to French private international law and at the end to French internal law. The purport of the passage, therefore, is that French private international law refers the matter to the law of Mrs. Annesley's nationality.

French law
misunder-
stood

Secondly, this conclusion—that the reference was to the *lex patriae* of the deceased—was fallacious. The French doctrine was that the validity of the will was determinable by the *lex domicilii*, not by the *lex patriae*, of the deceased, but that in the present case this was represented by English law, since she had not acquired a domicile in France according to French law.³

Judgment
inconsis-
tent

Thirdly, one half of the judgment is inconsistent with the other.⁴ The learned judge insisted, in accordance with established authority,⁵ that the French view with regard to the place of domicile was entirely irrelevant, and that he must regard Mrs. Annesley as having died domiciled in France. When, however, he had made his imaginary journey across the Channel, instead of ascertaining what law a French court would

¹ [1926] Ch. at pp. 706-7.

² Ibid., at p. 708. For article 13 see *supra*, p. 75, note 3.

³ Pillet, *Traité pratique de Droit International Privé*, ii. 607; Niboyet, *Manuel de Droit International Privé* (1928), S. 733; 36 *Y.L.J.* 731; cited by J. H. C. Morris, 18 *B.Y.B.I.L.* 40, note 5.

⁴ J. H. C. Morris, 18 *B.Y.B.I.L.* 40.

⁵ *Supra*, pp. 51-52.

administer in the case of a person domiciled in France, he did just the opposite and regarded himself as sitting in Paris dealing with the affairs of a person not domiciled in France.¹ He said in effect: 'I am bound to regard the deceased as having died domiciled in France'; but when he assumed the role of a French judge he recanted and said in effect: 'Now I am prepared to regard her as having died domiciled in England.'

It is reasonably clear, however, that he ultimately reached the haven of French internal law by following the routine of the foreign court doctrine: Involved reasoning

English private international law refers the matter to French law as being the *lex domicilii*.

A French judge would be referred by his own rules to English law.

He would, however, find himself referred back by English private international law to French law.

Partial renvoi is recognized in France.

Therefore, a French court would accept the remission, and in the result would apply French internal law.

It is noteworthy, however, that there was an alternative and simpler ground upon which the learned judge would have preferred to base his decision had he not conceived himself to be bound by previous authorities. This, the direct antithesis of the approach that we have just considered, was that the natural meaning of the expression 'the law of a country' is the internal law of the country in question. Correct solution preferred, but not adopted, by the judge

'When we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen.'²

Article 13 of the French Code which was in force at the time of *In re Annesley*, and which required the authorization of the Government for the acquisition of a domicile, has since been repealed.³ Therefore, if a similar case were to arise now, the deceased would be domiciled in France according both to English and to French law.⁴ Further, since the rule of private international law recognized in both countries is that the Position if facts of *In re Annesley* were to recur

¹ See generally Falconbridge, *op. cit.*, pp. 159 et seqq.

² At p. 709. This view was rejected by Luxmoore J. in *In re Ross*, [1930] 1 Ch. 377, 402; in a later case, *In re Askeu*, [1930] 2 Ch. 259, 278, Maugham J. considered that there was 'much to be said for it'. ³ *Supra*, p. 75, note 3.

⁴ This is not certain, however, for the English and French views as to what constitutes domicile differ slightly, more insistence being placed by English law upon the *animus manendi*; 19 *Journal of Comparative Legislation*, 243.

intrinsic validity of a will is governed by the *lex domicilii* of the testator, the application of French internal law would raise no controversy.

In re Ross:
intrinsic
validity of
will
is *In re Ross*.¹

The testatrix, a British subject, who was domiciled in Italy, both in the English and the Italian sense, disposed of her property by a will which excluded her son from the list of beneficiaries. This exclusion was justifiable by English internal law, but contrary to Italian internal law which required that one-half of the property should go to the son as his *legitima portio*. She left land in Italy and movable property both in England and Italy.

Luxmoore J. held with regard to the movables that in accordance with the English rule for the choice of law the claim of the son to his *legitima portio* must be determined by Italian law as being the *lex domicilii* of the testatrix. He then put the question—What is meant by the *lex domicilii*?

‘Does the phrase, so far as the English law is concerned, mean only that part of the domiciliary law which is applicable to nationals of the country of domicile (sometimes called the “municipal law” or the “internal law”); or does it mean the whole law of the country of domicile, including the rules of private international law administered by its tribunals? If the former contention is correct, then the English court, in deciding a case like the present, is not concerned to inquire what the courts of the country of domicile would in fact decide in the particular case, but what the courts of the domicile would decide if the *propositus*, instead of being domiciled in the foreign country, was also a national of that country. Whereas if the latter view is the correct one, the English court is solely concerned to inquire what the courts of the country of domicile would in fact decide in the particular case. In my opinion the latter is the correct view, as laid down by the English decisions. . . .’²

In the result the learned judge applied English internal law and disallowed the claim of the son. An Italian judge would have given the same decision. He would have referred the matter to the *lex patriae* and would have rejected the remission made to him by that law.

As regards the land, the English rule for the choice of law referred the judge to Italian law as being the *lex situs*. The expert evidence showed that an Italian court would again turn to the *lex patriae* and would adopt the rule of English internal

¹ [1930] 1 Ch. 377.

² *Ibid.*, at pp. 388–9.

law applicable to land situated in England and belonging to an English testator. It was held once more, therefore, that the claim of the son failed.

In this way Mrs. Ross was allowed to evade one of the cardinal rules of the legal system, the protection of which she had enjoyed for the last fifty-one years of her life.

The next case, *In re Askew*,¹ raised an issue of legitimacy.

In re Askew:
legitimacy (v).

Facts. By an English marriage settlement made upon the marriage of X, a British subject domiciled in England, with his first wife, Y, it was provided that X, if he married again, might revoke in part the settled trusts and make a new appointment to the children of 'such subsequent marriage'. Some time before 1911, X, who had long been separated from Y, obtained a German domicil. In 1911, having obtained a divorce from the competent German court, he married Z, in Berlin. Some time before the divorce a daughter had been born to X and Z in Switzerland. In 1913 X exercised his power of revocation and made an appointment in favour of his daughter.

The question before the English court was the validity of this appointment.

The short and correct answer to this question, and one that would have involved no reference to private international law, is that the daughter of Z was in no sense a child of the 'subsequent marriage', for the only marriage subsisting at the time of her birth was that between X and Y. She might be legitimate, but she could not possibly be the child of a non-existing marriage.² This fact, however, was not brought to the notice of the trial judge, Maugham J., who insisted that the validity of the appointment depended upon whether the daughter was legitimate. She could not claim legitimacy under the Legitimacy Act, 1926,³ since at the time of her birth her father was married to someone other than her mother.⁴ By English private international law, however, her legitimacy depended upon whether the German *lex domicilii* that was applicable to her father both at the time of her birth and also at the time of his marriage to Z recognized *legitimitas per subsequens matrimonium*.

Correct
ratio
decidendi
overlooked

The ratio
decidendi
of the
judge

In such a case, however, German private international law refers the matter to the *lex patriae* of the father. Moreover, the doctrine of *partial renvoi* is generally accepted in Germany. If, therefore, a German court were required to pronounce upon

¹ [1930] 2 Ch. 259; followed in *Collins v. A.-G.* (1931), 145 L.T. 551.

² *In re Wicks' Marriage Settlement*, [1940] Ch. 475.

³ *Infra*, p. 430.

⁴ S. 1 (2).

the legitimacy of Z's daughter, it would first refer to English law, and then, upon finding a remission made by English law to the *lex domicilii*, would accept this and apply German internal law. In other words, if the English reference to the *lex domicilii* is a reference to the private international law of the domicil, the daughter would be legitimate. Maugham J. felt that both on principle and on the authorities he was obliged to consider the private international law of Germany. He therefore decided in favour of the legitimacy of the daughter and the validity of the appointment.

(vi) *Kotia v. Nahas*: *Kotia v. Nahas*,¹ which was an appeal to the Privy Council from the Supreme Court of Palestine.

facts:- The problem here was to ascertain the legal system that governed the order of intestate succession to Mulk land (i.e. land in absolute ownership) situated in Palestine. The legislation of Palestine provided that, where the deceased owner was neither a Palestinian citizen nor a member of one of the religious communities, his Mulk land should be distributed in accordance with his national law. It also provided, however, that if the national law referred the question to the *lex situs*, then the *lex situs* should be applied by a Palestinian court.

The deceased owner in the present case was neither a citizen of Palestine nor a member of one of the religious communities, but a Lebanese national. The rule of Lebanese law is that succession to land situated outside the Lebanon shall be governed by the *lex situs*.

The Supreme Court of Palestine held that the succession was to be governed by Palestinian law. This decision was affirmed by the Privy Council.

Correct ground of the decision It is difficult to imagine how the decision could have been different. The court of first instance was bound by Palestinian law, which categorically ordained that in the circumstances under consideration there must be a reference to the national law, but that a remission, if any, made by that law must be accepted. In other words, there was a statutory obligation to accept the doctrine of *partial renvoi*.

The Privy Council's *obiter dictum* Unfortunately, the Privy Council, not content with this reason, delivered an academic disquisition in favour of the foreign court theory and, after citing the two cases of *In re Ross* and *In re Askew*, seized the opportunity to deliver the following *obiter dictum*:

'In the English courts phrases which refer to the national law of a *propositus* are prima facie to be construed, not as referring to the law

¹ [1941] A.C. 403.

which the courts of that country would apply in the case of its own national domiciled in its own country with regard (when the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant).¹

This broadside merits four observations.

First, it was otiose in the instant circumstances, since there was a statutory obligation binding upon the Palestinian court to apply the law which the Lebanese courts 'would apply to the particular case of the *propositus*'.

Objections
to the
*obiter
dictum*

Secondly, 'English courts', so far as is known, are never referred to the national law of the *propositus*. It may be, of course, that this observation is a quibble, and that even with the substitution of 'the law of the domicile' for 'the national law' the dictum was intended to represent the true position. If this substitution is justifiable, it is submitted once more that the view expressed is fallacious.

Thirdly, the Privy Council was sitting in England to hear an appeal from a Palestinian court and as such was constitutionally obliged to expound the private international law of Palestine. Its exposition of that law is, therefore, not authoritative upon the rules of English private international law.

Fourthly, the observation that regard must be had to what in the view of the foreign court was the domicile of the deceased, if it is intended to be of general import, offends the cardinal principle that the English view upon the place of domicile must alone prevail.

The next decision is *Armitage v. A.-G.*,² the one relevant case, *Armitage v. A.-G.*:
except *In re Askew*, not concerned with the post-mortuary foreign divorce (vii)
destination of property.

The fundamental rule is that a foreign divorce will not be recognized as valid in England unless it has been granted in the country in which the husband was domiciled at the time of the proceedings. A divorce granted according to the internal law of such country is valid in England, even though granted for a reason not sufficient by English internal law.

In *Armitage v. A.-G.* the husband was domiciled in New York. His wife obtained a divorce in South Dakota upon a ground which

¹ *Ibid.*, at p. 413.

² [1906] P. 135. For criticisms of the decision see 24 *Canadian Bar Review*, 73. Falconbridge, *op. cit.*, pp. 220-7.

was sufficient neither by New York nor by English internal law. The evidence showed, however, that a court in New York, had it been seised of the case, would have recognized the South Dakotan decree as valid.

Sir Gorell Barnes held that the validity of the decree must also be recognized in England.

The decision supports the foreign court doctrine

This decision, that a divorce decree will be upheld in England if its validity is admitted either by the internal law or by the private international law of the domicile, is a clear authority in support of the foreign court doctrine. Moreover, within the strict limits to which it is confined, it will no doubt remain unchallenged, for it is obviously of paramount importance that this particular aspect of marital status should be subject as far as possible to a common determining factor. The more universal the recognition granted to the view of the *lex domicilii*, the less danger there is that a person will rank as married in one country but unmarried in another.

(viii). In re Wellington: succession to land 1947. facts were as follows: In re The Duke of Wellington,¹ where the

The Duke of Wellington, a British subject domiciled in England, left two wills, one dealing with his Spanish, the other with his English property.

By the former he left his land in Spain to the person who would succeed both to his English dukedom and to his Spanish dukedom of Ciudad Rodrigo.² He died a bachelor, with the result that by the internal law of England his English dukedom passed to his uncle, while by the internal law of Spain his sister succeeded to the Spanish dukedom. Therefore, the Spanish land remained undisposed of, since there was no one person qualified to take both dukedoms.

The problem, therefore, was to identify the person to whom the Spanish land passed, and this depended upon whether the solution was to be found in the internal law of Spain or of England. By the former, the testator was entitled to devise only half of his land, the other half passing as on intestacy;³ by English internal law, the land would pass to the next Duke of Wellington under the residuary gift contained in the English will.

Wynn-Parry J. decided in favour of English internal law for the following reasons: The English rule for the choice of law referred him in the first instance to Spanish law, which,

¹ [1947] Ch. 506.

² This will also disposed of his movables in Spain.

³ This difference is not brought out in the report, see 64 L.Q.R. 266.

having regard to such cases as *In re Ross*,¹ meant the private international law of Spain; the Spanish code provides that testate and intestate succession shall be determined by the national law of the deceased, whatever be the country in which the property is situated; therefore, the question was whether a Spanish court, having thus been referred to the national (English) law, would accept the remission made by that law to the *lex situs*. In short, was the doctrine of *partial renvoi* recognized in Spain? After considering the conflicting evidence of the expert witnesses and the conflicting decisions of two Spanish courts of first instance, the learned judge reached the conclusion that a court in Spain would not accept the remission made by the national law. Therefore, the present duke was entitled to the land under the English will.

3. *The present law*

This review of the principal decisions discloses that the foreign court doctrine is not of general application. With two exceptions,² the issue has been confined to the post-mortuary disposition of property, and there has never been any suggestion that the doctrine is to be extended to the field of commercial law or, indeed, to every question affecting testacy and intestacy. In the countless cases dealing with such matters as contracts, insurance, sale of movables, gifts *inter vivos* or *mortis causa*, mortgages, negotiable instruments, partnerships, dissolution of foreign companies, and so on, the English courts, when referred to 'the law' of a foreign country, have never had the slightest hesitation in applying the internal law of that country.³ Nevertheless, the decisions, few though they are, stand. They perhaps show that the judges, in considering whether the reference may not be to the private international law of the chosen country, have taken the view 'that the various categories of cases merit individual consideration in the light of expediency' and that the entire problem is not to be decided on *a priori* reasoning.⁴ One writer, who has done much to illuminate the subject, suggests that the *renvoi* doctrine cannot be

¹ *Supra*, p. 78.

² *In re Askew*, *supra*, p. 79 (legitimation); *Armitage v. A.-G.*, *supra*, p. 81 (foreign divorce).

³ *In re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, where at p. 97 it was said *per curiam*: 'Had it been necessary to decide the point . . ., we should have been disposed to hold that the principle of *renvoi* finds no place in the field of contract'.

⁴ Rabel, i. 72.

rejected *in toto*, since it has proved to be a useful and justifiable expedient for the solution of at least certain special questions.¹

Cases to
which it
applies

The conclusion, in fact, is that in general a reference made by an English rule for the choice of law to a foreign legal system is to the internal law, not to the private international law, of the chosen system, but that this general principle is subject to the following exceptions.

(i) Formal
and essen-
tial validity
of bequests

First, grant of probate will not be denied to a will of movables on the ground of formal invalidity if the instrument is formally valid according to the private international law, though not according to the internal law, of the governing legal system.² Also, where the essential validity of a will³ or the intestate succession to movables⁴ is determinable by the law of a foreign country, the view that would be taken of the matter by the foreign judge, if he were seised of the case, must be adopted.

(ii) Foreign
divorces

Secondly, a divorce recognized as valid by the private international law, though not by the internal law, of the governing system (*lex causae*) will be recognized as valid by an English court.⁵

(iii) Title
to foreign
land

Thirdly, where a question arises of the right to foreign immovables, as in *Ross v. Ross*,⁶ the English court will administer the private international law of the country where the immovables are situated, if it would be administered by a court of the *situs* seised of the same question.⁷ This may be justified on the ground that it promotes the security of title.⁸

Fourthly, if the English rule for the choice of law refers a disputed title to movables to their *lex situs* at the time when the alleged title was said to have been acquired, it is probable that the court will apply the internal system of law that a court of the *situs* would apply in the particular circumstances of the case.⁹

Fifthly, the implication of *Taczanowska v. Taczanowski*¹⁰

¹ Falconbridge, 6 *Vanderbilt Law Review*, 708.

² *Collier v. Rivaz*, *supra*, p. 73; *Frere v. Frere*, *supra*, p. 74.

³ *In re Annesley*, *supra*, p. 75; *in re Ross*, *supra*, p. 78.

⁴ *In re O'Keefe*, *supra*, p. 71.

⁵ *Armitage v. A.-G.*, *supra*, p. 81, and *infra*, p. 394.

⁶ *Supra*, p. 78.

⁷ *In re Ross*, *supra*, p. 78; *In re Duke of Wellington*, *supra*, p. 82; *Re Schneider's Estate*, 96 *N.Y.S.* (2d) 652 (Surr. Ct. 1950), discussed 4 *I.L.Q.* 268-9; 6 *Vanderbilt Law Review*, 725 et seqq. See the American Restatement, S. 8.

⁸ Yntema, 35 *Canadian Bar Review*, 740.

⁹ *Cp. Goetschius v. Brightman* (1927), 245 *N.Y.* 186; *infra*, p. 394.

¹⁰ [1957] *P.* 301; see also *Hooper v. Hooper*, [1959] 1 *W.L.R.* 1021.

seems to be that a reference to the place of celebration of marriage is a reference to the whole law of that place.

After the law to govern the main question before the court has been ascertained by the application of the relevant rule for the choice of law—after it has been ruled, for instance, in an action for breach of contract that the governing law is the law of Greece—a further rule for the choice of law may be required in order to answer some subsidiary question that affects the main issue.

The
'incidental
question'

Suppose that a contract between *X* and *Y*, which according to English private international law falls to be governed by the law of Greece, is alleged to have been broken by *Y*. *X* dies, but by Greek law his right of action survives to his widow. The latter now pursues the cause of action in England, but it is pleaded that she is not *X*'s widow, since the marriage solemnized between her and *X* in England was formally void. It was valid according to the English rule for the choice of law, but void according to the Greek rule.

The main problem, whether there has been a breach of contract, is clearly determinable by Greek law, but must the subsidiary problem of the validity of the marriage also be referred to that law? A question of this nature has been aptly termed by Wolff the 'incidental question',¹ though the less satisfactory expression 'preliminary question' is in more general use. Jurists differ on the subject. Some favour the choice of law rules of the *forum*, others argue that the law which governs the principal question must govern throughout.² Anglo-American judges have never directly considered these opposing views. What they do in practice, in circumstances which are said by jurists to raise this controversy, varies according to the class of case under review. If it is one in which they are referred to the internal law of a foreign country, as in the example of the contract given above, they separate the incidental from the main question and apply the appropriate English choice of law rule to each. But if it is one of those exceptional cases in which the doctrine of total *renvoi* requires the whole law of the foreign country to be followed, then both the main and the incidental questions are referred to that law. If, for instance,

¹ *Private International Law*, p. 206.

² Robertson, *op. cit.*, pp. 135 et seqq.; Breslauer, *Private International Law of Succession*, p. 18; Nussbaum, *Principles of Private International Law*, pp. 104-9; Wolff, pp. 206-12; 54 *L.Q.R.* 611-12; 62 *L.Q.R.* 89, book review by J. H. C. Morris; Falconbridge, 17 *Canadian Bar Review*, 377-8; 53 *L.Q.R.* 564; Dicey, pp. 57-63.

the case is one of succession to Italian immovables and it is denied that owing to the invalidity of her marriage the claimant is not the widow of the deceased owner, the Italian rule for the choice of law governing the question should on principle be preferred if it differs from the English rule.

The Hague
Convention
of 1951

It remains to add that a convention, designed to reconcile the clash between the *lex domicilii* and the *lex patriae*—by far the most usual situation to raise a problem of *renvoi*—was concluded at The Hague in 1951. Its most important feature is a remarkable concession in favour of the *lex domicilii* made by those delegates at the conference representing countries that favour the principle of nationality, for the crucial article provides as follows:

When the country of a person's domicil adopts the principle of nationality and the country of nationality adopts the principle of domicil, every contracting State shall apply the internal law of the domicil.¹

The advantages of this rule, if it were to become English law, would be obvious. There would be less need for litigation, since cases such as *In re O'Keefe*² and *In re Ross*³ would present no difficulty; litigation, where necessary, would be less protracted and therefore less expensive, since the baffling inquiry relating to foreign views on the doctrine of *partial renvoi* would no longer be necessary; and questions concerning wills and intestacies would be resolved according to the internal law of the country in which the deceased had established his permanent home.

There is, however, no occasion to consider the convention in more detail, since it still awaits ratification by Great Britain.⁴

¹ Article 1.

² *Supra*, p. 71.

³ *Supra*, p. 78.

⁴ *First Report of the Private International Law Committee*, Cmd. 9068. For a fuller account of the convention see 38 *Grotius Society Transactions*, 35-39.

CHAPTER IV

GENERAL PRINCIPLES RELATING TO JURISDICTION

A. Persons to whom the jurisdiction of English courts is applicable. *Pages 87-106.*

(i) Persons who cannot sue. *Pages 87-88.*

(ii) Persons who cannot be sued. *Pages 88-106.*

B. The competence of English courts to entertain actions. *Pages 106-22.*

(i) Actions *in personam*. *Pages 107-9.*

(ii) Actions *in rem*. *Pages 109-11.*

(iii) Assumed jurisdiction over actions *in personam*. *Pages 111-22.*

C. Jurisdiction to stay actions. *Pages 122-7.*

THE two principal matters that require consideration here are, first, whether the jurisdiction of the English courts may be invoked by or against all persons in the world indifferently, and secondly, whether the competence of the courts to exercise jurisdiction over persons who are amenable thereto is in any manner restricted. We will, therefore, deal separately with:

A. Persons to whom the jurisdiction of English courts is applicable; and

B. The competence of English courts to entertain actions.

A. PERSONS TO WHOM THE JURISDICTION OF THE ENGLISH COURTS IS AVAILABLE

The general rule is that all persons may invoke or may become subject to the jurisdiction of the English courts, even though they are foreign by nationality or by domicile and even though the cause of action has arisen abroad or is otherwise intimately connected with a foreign country. Exceptionally, however, there are certain persons who cannot invoke the jurisdiction and certain persons against whom it cannot be enforced.

(i) *Persons who cannot sue.*

The one person disabled from suing in an English court is the alien enemy. Before a person can bear this character, there must, of course, be a state of war between Great Britain and an enemy country at the time of the attempted proceedings, and whether the countries are still at war despite the cessation of hostilities is conclusively settled by a certificate from the

Secretary of State for Foreign Affairs.¹ Given a state of war, however, the question whether a person is an alien enemy does not depend upon his nationality but upon where he resides or carries on business. A British subject or a neutral who is voluntarily resident, or who is carrying on business, in enemy territory or in territory under the effective control of the enemy is treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory.² A person of hostile nationality who is within the King's peace, as, for example, when he is resident in England under a cartel³ or by permission of the Crown,⁴ is temporarily free from his enemy character and may invoke the jurisdiction.⁵

Alien enemy cannot sue An alien enemy can neither initiate an action nor continue one that was commenced before hostilities.⁶

Alien enemy can be sued The disability of suing is based upon public policy, but there are no considerations of public policy which make it desirable to suspend actions *against* alien enemies, and it is now well established that they may be sued.⁷ Moreover, when sued they can plead a set-off in diminution of the claim of the plaintiff, they can take all the usual procedural steps, and they are at liberty to challenge an adverse judgment by appealing to a higher tribunal.⁸

(ii) *Persons who cannot be sued.*

Sovereigns and sovereign states. The persons who are immune

¹ *R. v. Bottrill*, [1947] K.B. 41 (C.A.).

² *Per curiam*, *Porter v. Freudenberg*, [1915] 1 K.B. 857, 869; *Sovracht (v.o.) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] A.C. 203. See 58 L.Q.R. 191. For the purposes of the Trading with the Enemy Act, 1939, which penalizes persons having intercourse with the enemy, *de facto* residence, though not voluntary, is sufficient, *Vamvakas v. Custodian of Enemy Property*, [1952] 2 Q.B. 183. ³ *The Hoop* (1799), 1 C. Rob. 195, 201.

⁴ e.g. when he was registered under the Aliens Restriction Act, 1914; *Princess Thurn and Taxis v. Moffit*, [1915] 1 Ch. 58.

⁵ *Johnstone v. Pedlar*, [1921] 2 A.C. 262.

⁶ *Porter v. Freudenberg*, *supra*. An alien enemy, respondent to a petition for the revocation of a patent, has been allowed, however, to amend his specification by way of disclaimer, since this constitutes a defence to the petition; *In re Stahlwerk Becker Aktiengesellschaft's Patent*, [1917] 2 Ch. 272. His right of action is generally abrogated, but sometimes merely suspended; see *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; *Schering Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] A.C. 219; Cheshire and Fifoot, *The Law of Contract* (5th ed.), pp. 280-2.

⁷ *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155; *Porter v. Freudenberg*, *supra*.

⁸ *Porter v. Freudenberg*, [1915] 1 K.B. 857.

from the jurisdiction of the English courts, despite their presence in England, are sovereigns and diplomatic officers.

In accordance with the maxim *par in parem non habet imperium*, the English courts are fully committed to the view that they will not exercise jurisdiction over the person or the property of a foreign sovereign State unless it is willing to submit to process.¹ The law has been reduced to two propositions by Lord Atkin:

Immunity
of sov-
eign per-
sonally

'The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

'The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. . . .

'I draw attention to the fact that there are two distinct immunities appertaining to foreign sovereigns: for at times they tend to become confused: and it is not always clear from the decisions whether the judges are dealing with the one or the other or both. It seems to me clear that, in a simple case of a writ *in rem* issued by our Admiralty court in a claim for collision damage against the owners of a public ship of a sovereign State in which the ship is arrested, both principles are broken. The sovereign is impleaded and his property is seized.'²

The writ referred to by Lord Atkin is one 'directed primarily against the ship and accordingly, through the ship, against all persons claiming any right or interest in the ship'.³ It is clear, therefore, that to issue such a writ in respect of sovereign property would be to bring the sovereign into court by means of his property instead of by means of his person, since he would be forced either to appear and to submit to the jurisdiction or to

¹ *The Cristina*, [1938] A.C. 485; *The Arantzazu Mendi*, [1939] A.C. 256.

² *The Cristina*, *supra*, at pp. 490-1. The subject of immunity has been fully discussed and a project for its reform prepared by the Institute of International Law, see *Annuaire de l'Institut de Droit International* (1952), vol. i, pp. 1-136. Unlike Great Britain, most countries have repudiated the doctrine of absolute immunity and they tend to distinguish between acts *jure imperii* and acts *jure gestionis*. There is immunity as regards the former, but not the latter; *Annuaire de l'Institut de Droit International* (1953), pp. 112-21 (Sir Hersch Lauterpacht). For the French practice see 27 *B.Y.B.I.L.* 293 et seqq. An Inter-Departmental Committee, set up to make recommendations upon the law of immunity, found the subject so difficult that it was unable to make a report; House of Commons Debates, vol 511, col. 81 (Feb. 13, 1953).

³ *The Jupiter*, [1924] P. 236, per Hill J., at p. 238.

allow judgment to go against his property by default.¹ An early case on the matter is The Parlement Belge.²

1880.

Facts:

A cross-channel steamer belonging to the Belgian Government, which carried not only the public mails but also merchandise and passengers for hire, came into collision with an English steam-tug lying at anchor in Dover Harbour. An action brought against the steamer was stayed for want of jurisdiction, the Court of Appeal holding that the immunity enjoyed by the Belgian Government was not lost by reason of the ship having been used for trading purposes.

Personal immunity

There is no limit to the immunity in the case of the sovereign personally. If he comes to this country, even under an assumed name, and enters into contracts and other engagements under the guise of an ordinary private person, no action can be entertained against him if he chooses to object to the jurisdiction.³

Proprietary immunity: when unlimited

Whether there is any limit to the immunity where an interest in property to which an action relates is claimed by a sovereign is not so clear, for the difficulty is to define what is meant by an interest sufficient to justify a stay of proceedings. It is obvious that if the bare assertion of a right in the property were to be regarded as sufficient, the doctrine of immunity might be nothing but a cloak for injustice. It can, at any rate, be affirmed that in the following cases the immunity is unlimited.

(i) Sovereign admitted owner

First, where the sovereign State is the admitted owner of the subject-matter of the suit, as in the case of a warship or of the cross-channel steamer in The Parlement Belge.

(ii) Sovereign in possession

Secondly, where the sovereign State, though not owner, is in *de facto* possession of the subject-matter through its own servants.⁴ This was the position in The Cristina.⁵

Facts:

After a privately owned ship, The Cristina, registered at Bilbao, had left Spain and was *en route* to Cardiff, the Spanish Republican Government, at that time recognized by Great Britain as the sovereign government of Spain, issued a decree requisitioning all vessels registered at Bilbao. Later, the Spanish Consul at Cardiff dismissed all officers and members of the crew not in sympathy with the Republican cause and appointed a new master and crew on behalf of his government.

It was held that a writ *in rem* issued by the owners claiming possession of the vessel must be set aside. The English courts

¹ The Jupiter, [1924] P. 236, *per* Hill J., at p. 238; The Broadmayne, [1916] P. 64, at pp. 73-74, *per* Pickford L.J.

² (1880), L.R. 5 P.D. 197; The Jupiter, [1924] P. 236.

³ Mighell v. Sultan of Johore, [1894] 1 Q.B. 149.

⁴ The Gagara, [1919] P. 95; The Cristina, [1938] A.C. 485.

⁵ [1938] A.C. 485.

are not prepared to displace a *de facto* possession obtained without a breach of the peace by the agent of a foreign sovereign.

Thirdly, the immunity applies without restriction where the sovereign, though neither owner nor in *de facto* possession, is in control of the subject-matter. A familiar illustration of this position is where a privately owned ship is requisitioned by the sovereign, but left in the charge of the master and crew appointed by the owner. In such a case the ship is *publicis usibus destinata* and is exempt from process while employed in the service of the sovereign.¹

(iii) Sovereign in control

Finally, the immunity is unrestricted in respect of chattels to which a sovereign State has an immediate right of possession, as, for example, where goods are in the *de facto* possession of its bailee. In *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*,² for instance, the facts were these:

(iv) Sovereign entitled to immediate possession

Gold: During the war of 1939 the American Army recovered sixty-four gold bars belonging to a French company that the Germans had seized at Limoges and carried off to Germany. In accordance with an agreement between the Allies, the gold was deposited with the Bank of England pending its ultimate distribution between the U.S.A., France and the U.K. The Bank sold thirteen of the bars by mistake but were still in possession of fifty-one.

The action of the French company against the bank, claiming delivery of the fifty-one bars and alternatively damages, was set aside for want of jurisdiction. The meaning of 'possession' in connexion with immunity, it was affirmed, must not be allowed to stand on such nice and subtle distinctions as that between the possession of a servant strictly so called and the possession of a bailee at will. In the words of Lord Radcliffe:

'The property of a sovereign State, which is an abstraction, must be in the physical possession of some actual person and I do not see any distinction of substance in a matter of this kind between the possession of a servant of the State and the possession of its bailee when the bailment is of such a nature as that of the Bank in this case.'³

On the other hand, the action by the company, in so far as it claimed damages for the conversion of the thirteen bars, was allowed to continue, since the bank had terminated the bailment by its own wrongful act and had thus removed the 'protective umbrella' of immunity in the sense that it no longer held the gold on behalf of a sovereign State.⁴

¹ *The Broadmayne*, [1916] P. 64; *The Arantzazu Mendi*, [1939] A.C. 256.

² [1952] A.C. 582. ³ *Ibid.*, at p. 618. ⁴ *Per* Lord Tucker at pp. 622-3.

Immunity
where title
to chose in
action
vested in
foreign
sovereign

It has now been decided by the House of Lords in Rahimtoola v. Nizam of Hyderabad¹ that the doctrine of immunity may 1958 equally well be invoked where the subject-matter of the suit is a *chose in action*, for otherwise the anomalous result would be that if a bank held chattels as bailee for a foreign State and was also indebted to the same State on current account the doctrine would apply in the former, but not in the latter, case. The facts before the House of Lords were these:

Case.

On the eve of the invasion of Hyderabad by Indian troops, Moin, the Finance Minister of the Nizam's Government, persuaded Rahimtoola, the High Commissioner for Pakistan in the United Kingdom, to accept a transfer of over a million pounds that was standing to the credit of the Nizam's Government with the Westminster Bank in London. This transfer was effected without the Nizam's authority or consent, but with the consent of the Foreign Minister of Pakistan. The State of Hyderabad, before its liquidation by India, transferred its interest in this sum of money to the Nizam, who later claimed it in an action brought against Moin, Rahimtoola, and the Westminster Bank.

The crucial issue on these facts was whether Rahimtoola took the transfer as a private person, in which case there would be no question of immunity, or whether he took it either as the agent or the *alter ego* of the Pakistan Government. If he acted in either of the last two capacities, he was obviously identified with that Government, which therefore could demand that the action be stayed. The majority of the Law Lords held that he acted as agent. Thus, the Government of Pakistan 'had an immediate and direct right to sue the bank in its own name for payment of this money, and in that sense it had a legal title. It had full control of this *chose in action*'.² Lord Denning disagreed with this finding, but none the less held that the claim was not cognizable by the English courts since it arose out of an inter-governmental transaction and therefore was better solved by inter-governmental negotiations.

Difficulty
when
sovereign
intervenes
in action
between
third-
parties

The four categories of cases already considered cover the situation where the ouster of a sovereign State from its existing ownership, possession or control is the object of the legal proceedings. What raises a far more complex problem, however, is an attempt by a sovereign to intervene in an action between two third-parties and to obtain a stay of proceedings on the ground that it possesses, for instance, a contractual interest to

¹ [1958] A.C. 379. For discussions of this decision, see 7 *J. & C.L.Q.* 176-87; 21 *M.L.R.* 165-9 (F. A. Mann).

² *Per* Lord Reid at p. 400.

the property to which the action relates. In such a case the court is faced with a dilemma. On the one hand the court itself offends the principle of immunity if it requires the sovereign to establish a claim; on the other hand, it can scarcely be content with the bare assertion of a claim that may or may not in fact be baseless.¹ Dealing with this latter position, Lord Greene in *Haile Selassie v. Cable and Wireless Ltd.*,² remarked:

'It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by, a private individual in this country, were to be deprived of the right to have his claim adjudicated upon by the courts merely because a claim to the property or the debt had been put forward on behalf of a foreign sovereign.'

The facts of the case itself were these:

By a contract made in 1935 between the defendants and the Ethiopian Director of Posts acting on behalf of the Emperor Haile Selassie, the defendants agreed to pay to the Emperor a proportion of the charges received by sending cables to and from Addis Ababa. In May, 1936, Italy annexed the Empire of Ethiopia and thereafter the British Government recognized the Italian Government as the *de facto* sovereign of the country, though it still recognized the Emperor as *de jure* sovereign. *Haile Selassie v. Cable & Wireless Ltd.*

The Emperor brought the present action in 1937 for the recovery of £10,613. 11. 3d., the amount due to him under the contract of 1935. The Italian Ambassador then notified the defendants that the above sum was claimed by his Government.

In view of this claim Bennett J. ordered that all further proceedings should be stayed. The Court of Appeal, however, discharged this order, holding that a sovereign cannot enforce the stay of an action to which it is not a party merely by putting forward a claim to an interest in the *res litigiosa*.

'But where property which is not proved or admitted to belong to, or to be in the possession of, a foreign sovereign or his agent is in the possession of a third party, and the plaintiff claims it from that third party, and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that title is being questioned.'³

The implication of this passage is that, when the sovereign is not a party to the action, his possessory or proprietary

¹ See the remarks of Lord Radcliffe in *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*, [1952] A.C. 582, at p. 616.

² [1938] Ch. 839, at p. 845.

³ *Ibid.*, at p. 844.

interest in the subject-matter must either be admitted or proved before immunity from the jurisdiction will be recognized.

Juan Ysmael & Co. v. Indonesian Government,¹ where the facts were these: 1955.

*Juan
Ysmael &
Co. v.
Indonesian
Govern-
ment*

The owners of a vessel issued a writ *in rem*, addressed to all parties interested, by which they claimed that legal possession of the vessel should be decreed in their favour. The Indonesian Republic, to whom the vessel had been chartered under a charter party now expired, moved to set the writ aside on the ground that their agent had made a contract with the owners' agent for the purchase of the vessel.

The Privy Council rejected this claim to immunity, being satisfied that the contractual title claimed was 'manifestly defective', since the owners' agent, as the agent of the Republic well knew, had no authority to sell the vessel.

Test pro-
posed by
Privy
Council

As regards the burden of proof imposed upon a sovereign State which claims an interest in the subject-matter of an action between third parties, the Board expressed the following opinion:

"The sovereign State is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign Government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."²

It is submitted with respect that this is guidance of doubtful value. A manifestly defective title as in the instant case is one thing, but whether the title is illusory may be more difficult to determine. The title claimed by the Italian Government in *Haile Selassie's case* can scarcely be described as illusory, and yet, rightly it is submitted, the Court of Appeal refused to apply the doctrine of immunity. Again, as Lord Denning asked when referring in a later case to the statement of the Privy Council: 'What degree of evidence is needed for this purpose? And if the foreign Government produces some evidence, is it not open to the plaintiff to displace it?'³ In truth, the line between substantial and unsubstantial claims defies precise definition, and it seems preferable in the interests of common

¹ [1955] A.C. 72. See discussion in 4 *I. & C.L.Q.* 469; 18 *M.L.R.* 184.

² *Ibid.*, at pp. 89-90.

³ *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, at p. 416.

justice to maintain the principle formulated by Lord Atkin¹ and others and expressed by Jenkins J. in the following words:

'Where the principle of immunity is invoked in cases in which the foreign sovereign State is not itself sued, but which concern property in which the foreign sovereign State claims some proprietary or possessory interest, then, in the absence of a proved or admitted right of property in the foreign sovereign State, possession or control by it of the thing in suit is a condition essential to the application of the principle.'²

It is difficult to believe that the courts will depart from the principle formulated by the learned judge.

A clear exception to the doctrine of immunity occurs where a foreign sovereign is one of the claimants to a trust fund falling within the jurisdiction of the English court.³ In such a case the Court of Chancery treats the administration of the trust as its domestic responsibility and it is prepared to determine the right of the beneficiaries, even though these may possibly or certainly include a foreign sovereign.⁴

The question which has been much canvassed, but never decided in England, is whether the doctrine of immunity can be successfully invoked where the action concerns immovables situated in England. If, for instance, the Government of the U.S.A. has taken a lease of a house in London for the accommodation of some mission which is not part of its diplomatic *entourage*,⁵ can the lessor sue for the recovery of rent or to recover possession under the proviso for re-entry if the covenant to repair has been broken?⁶ Sir Robert Phillimore said *obiter* that 'the exemption from suit is deemed not to apply to immovable property',⁷ and Westlake, after remarking that 'no court can be expected to renounce the determination of the property in its soil',⁸ described as unimaginable the suggestion

Immunity excluded in administration of a trust

Quaere whether immunity excluded in action relating to land

¹ *The Cristina*, [1938] A.C. 485, at p. 490.

² *Dollfus Mieg et Compagnie v. Bank of England*, [1949] Ch. 369, at p. 382.

³ *Larivière v. Morgan* (1872), L.R. 7 Ch. 550; on appeal *sub nom. Morgan v. Larivière* (1875), L.R. 7 H.L. 423, the House of Lords admitted the exception, but held that in the circumstances no trust existed.

⁴ See the remarks of Lord Radcliffe in *U.S.A. v. Dollfus Mieg et Cie S.A. & Bank of England*, [1952] A.C. 582, at pp. 617-18.

⁵ If the house were occupied by a diplomatic envoy, another principle of immunity would apply; *infra*, p. 103.

⁶ Case put by Sir Eric Beckett in the *Annuaire of the Institut de Droit International* for 1952, p. 72.

⁷ *The Charkieh* (1873) L.R. 4 Ad. & Ecc. 59, at p. 97.

⁸ *Private International Law* (4th ed.), p. 247; (7th ed.), p. 267.

that a mortgagee of English land could not have his usual remedies in England merely because the mortgagor was a foreign sovereign.¹

There is no English decision which supports or rejects Westlake's opinion and, though the question was argued with great learning by counsel in a modern case before the Privy Council, the Board was not required in the circumstances to provide an answer and it refrained from expressing an opinion one way or the other.² It would seem, however, that Westlake's opinion is correct. Where the immunity clearly applies, as, for example, in the case of an action relating to a ship, a person claiming to be the owner can, at any rate in theory, seek his remedy in the courts of the foreign sovereign and he may well succeed if a right of action is available there similar to that given by the Crown Proceedings Act, 1947.³ But no foreign court is competent to adjudicate upon a claim to land in England, and if the English court is to be deprived of jurisdiction there is no tribunal in the world by which justice can be done.

Unsatisfactory
nature of
the English
doctrine

The English doctrine, established by the *Parlement Belge*,⁴ that a ship belonging to a foreign sovereign is immune from the jurisdiction of the courts even though it is used for commercial purposes, has promoted little but injustice in the changed conditions of the world. This became evident soon after the European war of 1914 when States continued to carry on trade with ships that originally they had requisitioned solely for the better prosecution of hostilities, with the result that a number of vessels were sailing the seas immune from all liabilities. Thus in the *Porto Alexandre*,⁵ a former German ship that had been requisitioned by the Portuguese Government ran aground in 1919 at the entrance to the Mersey while she was carrying cork shavings for a private trading company. Proceedings brought by the salvors for the services that they had rendered were stayed on the ground that the vessel was public national property.

That Sovereign States which engage in the sea-carrying trade should be relieved of the obligations to which private shipowners are subject is unjust, if indeed not preposterous.⁶

¹ Westlake, *Private International Law* (4th ed.), p. 249.

² *Johore, Sultan of v. Abubakar Tunku Aris Bendahar*, [1952] A.C. 318. All the foreign authorities on either side were collected by counsel and the arguments provide a storehouse of learning for the curious.

³ 10 & 11 Geo. VI, c. 44.

⁴ (1880) L.R. 5 P.D. 197; *supra*, p. 90.

⁵ [1920] P. 30.

⁶ By the Immunity of State Ships Convention, concluded at Brussels in 1926

Moreover, the injustice has been increased by the emergence of welfare and totalitarian States, for the activities of sovereign governments, originally mainly political, have now expanded immeasurably both in extent and scope. States tend more and more to enter the field of commerce, even to the extent of carrying on the business of buying and selling goods.¹ It is, indeed, often said to be incompatible with the dignity of a sovereign that he should be subjected to the jurisdiction of a foreign court, but the obvious riposte to this is that if he deigns to descend into the market-place and to compete with private traders he should not stand upon his dignity when threatened with legal proceedings. In the words of Lord Denning: 'It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it.'² The present English doctrine is in fact so out of tune with the times that the failure of the legislature to restrict its field of application is a little surprising. Many legal systems have retreated from the principle of absolute immunity by distinguishing between *acta imperii* in respect of which immunity can be demanded and *acta gestionis* which are freely subject to the jurisdiction of foreign courts; and the State Department at Washington has announced that it will no longer favour claims to immunity with regard to business transactions.³

The status of a foreign sovereign is a matter of which the court takes judicial notice, that is to say it is a matter which the court is either assumed to know or to have the means of discovering without embarking upon a contentious inquiry.⁴ Where it is doubtful whether a person enjoys sufficient

Proof of
sovereignty

and amended by a protocol in 1934, provides that commercial vessels and cargoes belonging to States shall be justiciable to the same extent as if privately owned. The convention, however, has not been ratified by Great Britain. By 1938 it had been ratified by Germany, Italy, Holland, Belgium, Estonia, Poland, Brazil, Chile, Hungary, the Netherlands, Norway, Romania, and Sweden.

¹ See, for example, *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438; *infra*, p. 100. As to the legal aspects of State trading, see 25 *B.Y.B.I.L.* 34-51 (J. E. S. Fawcett).

² *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, at p. 418. See also *The Cristina*, [1938] A.C. 485, at pp. 521-3, *per* Lord Maugham.

³ *Department of State Bulletin*, June 23rd, 1952, pp. 984-5. See also the suggestion of Lord Denning in *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379 at p. 422, that the immunity of a sovereign should depend upon the nature of the dispute. The need for the reform of the English doctrine is fully canvassed by Judge Sir Hersch Lauterpacht in 28 *B.Y.B.I.L.* 220-72, and by A. B. Lyons in 42 *Transactions of the Grotius Society*, 61-81.

⁴ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, *per* Kay L.J., at p. 161.

independence to entitle him to immunity, as, for instance, in the case of a ruler in Malaya¹ or in a case after the India Independence Act, 1947, of a former ruler of an independent state in India,² the court must apply in the normal case to the Secretary of State for Foreign Affairs or if the alleged sovereign resides in the British Commonwealth, then to the Commonwealth Relations Office. The answer is final and conclusive and cannot be questioned either by the parties or by the court.³

'The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.'⁴

Distinction
between *de*
facto and
de jure
sovereign

The same rules apply to the delicate situation that arises when two contending bodies each claim to be the sovereign Government of a foreign country, as was the case, for instance, during the revolution that broke out in Spain in 1936. At one stage, for instance, in the Spanish civil war, the British Government recognized the Spanish Republican Government as the *de jure* Government of the whole of Spain, but at the same time it also recognized the insurgent Government of General Franco as the Government *de facto* of certain areas of the country in which the nationalist intervention had succeeded. The duty of the court in such circumstances is to treat the acts of the *de facto* Government within the area in question as unquestionable, and conversely to treat the acts of the *de jure* Government within the same area as mere nullities.⁵

The recognition of a foreign Government dates back to the time when it gained *de facto* control over a particular territory, but only with regard to persons and property within that

¹ *Mighell v. Sultan of Johore*, [1894] 1 Q.B. 149, per Kay L.J., at p. 161.

² *Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, [1952] 2 Q.B. 390.

³ *Foster v. Globe Venture Syndicate Ltd.*, [1900] 1 Ch. 811; *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797.

⁴ *The Arantzazu Mendi*, [1939] A.C. 256, at p. 264, per Lord Atkin.

⁵ *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176 and authorities there cited. For the different types of recognition see 19 *B.Y.B.I.L.* 238. 'A *de jure* Government is one which in the opinion of the person using the phrase ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* Government is one which is really in possession of them, although the possession may be wrongful or precarious'; Wheaton, *International Law* (5th English ed.), p. 36, adopted by Scrutton, L.J., *Luther v. Sagor*, [1921] 3 K.B. 532, 543.

territory. Thus acts done before such recognition by the former sovereign in territory within his control are unaffected.¹

A difficult question arises when an action is brought against a corporation, such as the United States Shipping Board or the Polish Economic Bank, which claims to be an emanation of a foreign State and therefore entitled to sovereign status. The status of such a defendant body is not one of which judicial notice is possible, nor one upon which a Secretary of State has ever given a certificate.² The court must decide the question upon evidence. The onus lies upon the defendant corporation to prove what its position is under its own law, and with regard to this the English courts have taken the view that the best evidence is an affidavit or certificate given by the ambassador of the foreign State in question. An affidavit which declares that the corporation is a department of State is not, however, conclusive, for it is open to the plaintiff to adduce evidence to the contrary.

Proof of
status of
foreign
corpora-
tions

The particular problem that has troubled the courts in this context arises where the affidavit declares that the corporation, though a department of State, is a separate legal entity distinct from that State. For instance, in *Krajina v. Tass Agency*³ (which was an action to recover damages for a libel published in a weekly paper called *The Soviet Monitor*), the Russian ambassador certified that the Agency was statutorily entitled to 'all the rights of a juridical person' and that it was a department of the Soviet State 'exercising the rights of a legal entity'. Again, in a case brought eight years later, the Spanish ambassador in London stated that a body called *Servicio Nacional del Trigo* was a department of the Ministry of Agriculture in Madrid, but the additional expert evidence, accepted by both parties to the action, showed that it was a distinct legal person in the sense that it possessed its own corporate existence.⁴ The suggestion that such a body should be afforded immunity is open to at least three doubts.

First, if the basis of the doctrine of immunity is the desire to preserve a foreign sovereign's dignity, as the judges have constantly affirmed, there seems no sound reason why such solicitude should be shown for the dignity of an independent corporation created by that sovereign.

Objections
to corpor-
ate im-
munity

¹ *Bogusławski v. Gdynia-Ameryka Linie*, [1951] 1 K.B. 162.

² 33 B.Y.B.I.L. 309.

³ [1949] 2 A.E.R. 274.

⁴ *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438. See 6 J. & C.L.Q. 290 et seqq. (K. W. Wedderburn).

Secondly, that a corporation, at one and the same time, can be both an organ of the State and also a juristic person separate from the State seems a little illogical.

Thirdly, it seems doubtful policy to extend the doctrine of immunity to the point of allowing a trading corporation to avoid legal proceedings to which its rivals are exposed. This particular objection is well illustrated by the second of the two cases mentioned above—*Baccus S.R.L. v. Servicio Nacional del Trigo*.¹

The plaintiffs were a company carrying on business in Italy; the defendants who, as we have seen, were alleged to be a department of the Spanish Ministry of Agriculture, had been incorporated for the purpose of buying and selling grain and other cereals. Two contracts, by which the defendants agreed to sell 26,000 tons of rye to the plaintiffs, provided that any dispute between the parties should be submitted 'to the jurisdiction of the technical courts at London'. When they were sued for breach of contract in the High Court, the defendants claimed immunity.

In this type of case the Court of Appeal has resisted the opportunity to temper the doctrine of immunity. In *Krajina's Case*² it found that the separate existence of the Tass Agency had not been proved, and therefore the argument that a legal entity distinct from the State cannot demand immunity failed *in limine*. Two of the Lords Justices expressed the opinion that proof of a separate existence would not necessarily exclude the right of immunity, but Singleton L.J. expressed considerable doubt about extending the right to a corporate body carrying on business in this country. In the *Baccus Case*, the majority held that the *Servicio Nacional del Trigo* was entitled to immunity notwithstanding its admitted existence as a separate legal entity. The passage of time, however, had only served to fortify the doubts of Singleton L.J. He dissented, holding that no sound reason could be found for allowing a legal entity set up by a Sovereign State to escape from the jurisdiction of the English court.³

Sovereign
may submit
to juris-
diction

Proceedings brought against a foreign sovereign must be stayed if he remains passive or if he moves to set the writ aside, but it is always open to him to waive his immunity and to submit to the jurisdiction. A submission is ineffective unless it is made by some person with the authority of the foreign sovereign, who has knowledge of the right to be waived and who

¹ [1957] 1 Q.B. 438.

³ [1937] 1 Q.B. 438, at p. 463.

² *Supra*, p. 99.

appreciates the effect of the English law of procedure.¹ It is equally ineffective unless it is made *ex facie* the court, i.e. made at the time when the jurisdiction is invoked, not at some earlier time. Thus a foreign sovereign can repudiate a solemn promise by which he has agreed to submit to the jurisdiction of the English court in the event of a dispute arising between him and the promisee.² An agreement for future submission is sterile. Waiver, in fact, is effective only where the sovereign himself invokes the jurisdiction as a plaintiff or where he appears as a defendant without objection and fights the case on its merits, or where he is bound by treaty to submit to the particular proceedings that have been brought against him.³

According to English law, a submission made in one of these three ways is severely limited in extent. It is not a submission to the jurisdiction generally. Its only effect is to enable the court to do justice in the matter actually referred to it for decision.⁴ Thus, if a foreign sovereign brings an action and thereby submits to the jurisdiction, a counter-claim set up by the defendant is not within the submission unless it is directly related to the plaintiff's cause of action.

Effect of
submission

'If the waiver is by appearing as defendant and arguing on the merits it will extend only to the case disclosed in the writ or pleadings and the plaintiff will not subsequently be able to widen the scope of his action by amendment of the pleadings or otherwise, unless there is a new waiver to cover the amendment. If it is a waiver by appearing as plaintiff, the court will have jurisdiction to decide on matters put before it by the defendant only to the extent that justice requires that the court

¹ *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 348 at p. 473, per Parker L.J. In that case the defendants entered an appearance a month after the writ was served on them, but were allowed to withdraw this submission some two years later on the ground that the person who made it had no knowledge of the right to be waived and that he had acted without the authority of his superiors.

² *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797 (but as to the effect of this decision, see 34 *B.Y.B.I.L.* 260-73, E. J. Cohn); *Kahan v. Pakistan Federation*, [1951] 2 K.B. 1003.

³ This last possibility, designed to meet the exigencies of Civil Air Transport now frequently carried on by Government bodies, is envisaged by the Administration of Justice Act, 1938, s. 13, which provides that if States enter into a convention by which they agree to render themselves or their property liable to proceedings in the courts of other States and if H.M. certifies by Order-in-Council that the convention has come into force as respects England, every foreign State adhering to the convention shall be deemed to have submitted to any proceedings to which it is made a party in the Supreme Court.

⁴ *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385, at p. 417, per Lord Sterndale; at p. 421, per Lord Warrington.

should consider them in order that it can pronounce on the plaintiff's claim.¹

Thus where the South African Government applied to the court for the appointment of a new trustee of a fund into which the defendants, concessionaires of a railway in the Transvaal, had paid a large sum of money, it was held that a counter-claim for damages in respect of an alleged breach of the concession by the Government must be struck out. Its object was not to mitigate the particular relief sought by the sovereign plaintiff, but to obtain a decision upon a dispute not raised by the statement of claim.² In a later case, a counter-claim for damages for a slander alleged to have been uttered by the plaintiffs was struck out of an action for breach of contract brought by the High Commissioner for India and the Indian Union.³

Within these limits, however, i.e. for the purpose of the very proceedings to which submission has been made, the sovereign is bound by the English rules relating to counter-claims and defences, and also by procedural requirements, such as the obligation to make discovery of facts or documents or to give security for costs.⁴

Distinction
between
judgment
and
execution

A submission to the jurisdiction made by a sovereign is a submission to the ultimate judgment of the court, but it is not a submission to the enforcement of the judgment. It merely confers the *jus dicendi* upon the court, empowering it to declare the rights of the parties.⁵ Therefore, any property belonging to him and situated in England is immune from execution unless he makes a further submission.⁶

'Judgment and execution are two different things. . . . The initial submission to the jurisdiction . . . does not preclude the sovereign State from now invoking that international comity which induces this country to decline to exercise by means of its courts any of its territorial jurisdiction over the property of a sovereign State within its territory.'

¹ Sir Eric Beckett, *Annuaire l'Institut de Droit International* (1952), i. 79.

² *South African Republic v. La Campagne Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190.

³ *High Commissioner for India v. Ghosh*, [1960] 1 Q.B. 134. See 9 *I. & C.L.Q.* 334 et seqq.

⁴ *Republic of Costa Rica v. Erlanger* (1876), 3 Ch.D. 62 (costs); *Prioleau v. United States & Andrew Johnson* (1866), L.R. 2 Eq. Cas. 659 (discovery).

⁵ *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385 at p. 407, argument of counsel.

⁶ *Duff Development Co. v. Kelantan Government*, supra.

⁷ *Ibid.*, at p. 400, per Russell J. This double immunity obtains in the U.S.A. and in France, 42 *Transactions of the Grotius Society*, 75.

Ambassadors and other diplomatic officers.

It has long been recognized that the representatives in this country of a sovereign State are sent on the faith that they shall have the same immunity from adverse jurisdiction as the sovereign power whom they represent.¹ The Diplomatic Privileges Act, 1708,² which is declaratory though not exhaustive of the common law,³ provides in accordance with this principle that an ambassador accredited to this country cannot be sued against his will. He is exempt from civil and criminal liability. This immunity is shared by his personal family, i.e. by his wife and children if still under his parental control,⁴ and by his diplomatic family, as it is sometimes called, namely, his counsellors, secretaries, clerks and domestic servants.⁵ A consul is not a diplomatic envoy and is immune from jurisdiction only to a limited extent. His archives and the official papers kept at the consulate are inviolable and he is not liable either to civil or criminal proceedings for acts performed in his official capacity and falling within the functions of a consular officer. In contrast to a diplomatic officer, however, he is liable in respect of his private transactions.⁶ This disparity, now that certain countries such as the United States of America have amalgamated their diplomatic and consular services, is calculated to cause embarrassment.⁷

Immunity
of diplo-
matic
officers

The immunity is absolute in the case of an ambassador or public minister and his family and remains effective even though he engages in private trading, but it does not extend to the servants of the Embassy so far as they engage in trading transactions.⁸

A diplomatic officer may waive his privilege, but he can do this effectively only if he has full knowledge of his rights, and

Diplomatic
officers may
submit to
jurisdiction

¹ *The Parlement Belge* (1880), 5 P.D. 197, 207 *per curiam*; *Dickinson v. Del Solar*, [1930] 1 K.B. 376. For a detailed account of the rules governing diplomatic immunity see 30 *B.Y.B.I.L.* 116-51; 31 *B.Y.B.I.L.* 299-340 (A. B. Lyons). See further, 40 *Transactions of the Grotius Society*, 65 et seqq.

² 7 Anne, c. 12. For an account of the circumstances leading up to this statute see Blackstone's *Commentaries*, i. 255.

³ *The Amazone*, [1940] P. 40.

⁴ *In re G. (An infant)*, [1959] Ch. 363.

⁵ *Engelke v. Musmann*, [1928] A.C. 433, 450, *per* Lord Phillimore.

⁶ 21 *B.Y.B.I.L.*, pp. 34 et seqq. (article by Sir Eric Beckett).

⁷ The United Kingdom made a Consular Convention with the U.S.A. in 1949; 25 *B.Y.B.I.L.* 280.

⁸ Proviso to 7 Anne, c. 12; *Taylor v. Best* (1854), 14 C.B. 487, at 519, *per* Jervis C.J.; *The Porto Alexandre*, [1920] P. 30, at 37; *Heathfield v. Chilton* (1767), 4 Burr. 2016; *Viveash v. Becker* (1814), 3 M. & S. 284; *Musmann v. Engelke*, [1928] 1 K.B. 90, 103.

provided that he first obtains the consent of his sovereign or of his official superior.¹ His immunity is the immunity of the ambassador and ultimately that of the Government which he represents, so that if it is waived by the ambassador or by the Government it ceases.²

Proof of
diplomatic
rank

It is usual for an ambassador to furnish the Foreign Office with a list of persons engaged in the Embassy, and it has now been established that if the Foreign Office accepts this list and informs the court that it includes the name of some person against whom it is sought to take judicial proceedings, the information is final and conclusive upon his status.³ In *Engelke v.*

Musmann:⁴

1928 - fails: The defendant to an action for the recovery of arrears of house rent applied to set aside the writ on the ground that he was a member of the German Embassy. The plaintiff, who contended that the defendant was a consul and therefore not entitled to immunity from the jurisdiction, applied for leave to cross-examine him upon this matter. Leave was given, but upon an appeal from the order the Attorney-General appeared at the request of the Foreign Office and informed the court that the defendant had been accepted by the British Government as a member of the staff of the German Ambassador under the style of Consular Secretary. It was held by the House of Lords that this statement was binding on the court.

Lord Phillimore, after showing that the British Government may refuse to accept any person tendered by an ambassador as a member of his staff, said:⁵

'When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State, on behalf of His Majesty, had done, not what he was doing *ad hoc* or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has already been created by the Crown in virtue of its prerogative, in order to administer its relations with a foreign country in accordance with international law.'

Procedure

Normally the Foreign Office supplies the information upon the request of the court or of one of the litigants, though in

¹ *Dickinson v. Del Solar*, [1930] 1 K.B. 376.

² *Rex v. A.B.*, [1941] 1 K.B. 454.

³ *Taylor v. Best* (1854), 14 C.B. 487; *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *In re Suarez*, [1918] 1 Ch. 176.

⁴ *Engelke v. Musmann*, [1928] A.C. 433.

⁵ *Ibid.*, p. 451.

cases of importance the Law officers may intervene and themselves inform the court.¹ In *Price v. Griffin*,² however, where the United States Vice-Consul was sued for breach of promise of marriage, the Foreign Office wrote a letter to the court claiming diplomatic immunity for the defendant on the ground that he was a member of the embassy staff, and this was accepted as conclusive by Birkett J. This was peculiar in at least two respects: it is not usual for the Foreign Office to act *proprio motu*, and the normal practice is to certify merely the status of the official, leaving it to the court to decide whether this entitles him to diplomatic immunity.

The immunity of an ambassador is not confined merely to the period during which he is accredited to the English sovereign, but continues for such period after presentation of his letters of recall as is reasonably necessary for the winding up of his official business and his private affairs. The fact that his successor enters upon his official duties before the termination of this reasonable period does not affect the immunity.³ But if he is dismissed and his immunity waived by his sovereign, no extension of the immunity is allowed.⁴

The International Organizations (Immunities and Privileges) Act, 1950, which consolidates the Diplomatic Privileges (Extension) Acts, 1944, 1946, and 1950, provides that all or some of the privileges and immunities specified in the schedule to the Act may be conferred by Order in Council upon the following organizations and their members:⁵

- (i) International organizations,⁶ such as the United Nations, the International Court of Justice, and the International Labour Office.
- (ii) Representatives and high officers of such organizations, persons employed by them on missions, members of their official staff and members of committees.⁷
- (iii) Other officers of the organization⁸ and members of the families of high officers.⁹

¹ 26 B.Y.B.I.L. 434.

² *The Times* newspaper, 20 February 1948; 2 I.L.Q. 266; but more adequately stated and discussed 26 B.Y.B.I.L. 433-7 (A. B. Lyons).

³ *Magdalena Steam Navigation Company v. Martin* (1859), 2 E. & E. 94; *Musurus Bey v. Gaddan*, [1894] 2 Q.B. 352.

⁴ *Rex v. A.B.*, [1941] 1 K.B. 454.

⁵ See 4 I.L.Q. 245-7.

⁶ International Organizations (Immunities and Privileges) Act, 1950, paras.

1 (1), (2) (a); Schedule Part I.

⁷ *Ibid.*, para. 1 (2) (b); Schedule, Part II.

⁸ *Ibid.*, para. 1 (2) (c).

⁹ *Ibid.*, Schedule, Part IV, para. 13.

The maximum immunities that may be granted to an organization or to a member thereof vary with each case. Thus, high officers and members of committees and missions may be put on the same footing as a foreign ambassador with regard to immunity from suit and legal process, inviolability of residence, and exemption from taxes,¹ but the maximum privileges of other officers and servants are limited to immunity from suit and legal process in respect of things done in the course of their employment and to exemption from income-tax upon their official salaries.²

The Diplomatic Immunities Restriction Act, 1955, provides that if the personal immunities enjoyed by the envoys of a foreign sovereign Power exceed in any respect those granted in the territories of such Power to an envoy of Her Majesty, they may be withdrawn by Order in Council to such extent and in respect of such classes of persons as appears proper.³ It is also provided that no citizen of the United Kingdom and Colonies shall be entitled to personal immunities,⁴ though this prohibition does not extend to any immunity enjoyed by virtue of an office held before the passing of the Act.⁵ The expression 'personal immunities' means

'immunity from suit or legal process (except in respect of things done or omitted to be done in the course of performance of official duties) and inviolability of residence'.⁶

(B) THE COMPETENCE OF ENGLISH COURTS TO ENTERTAIN ACTIONS

- (i) Actions *in personam*. Pages 107-9.
- (ii) Actions *in rem*. Pages 109-11.
- (iii) Assumed jurisdiction over actions *in personam*. Pages 111-22.

Scope of
the inquiry

Our object now is to discuss what is sometimes called jurisdiction *ratione personae*, i.e. to specify the persons against whom an action containing a foreign element will lie. This question must be considered under three heads, for we must first distinguish the action *in personam* from the action *in rem*, and then deal with the exceptional cases in which the court has statutory authority to assume jurisdiction over persons who are absent from England.)

¹ International Organizations (Immunities and Privileges) Act, 1950, Schedule, Part II.

³ 4 Eliz. 2, c. 21, S. 1 (1).

⁵ Ibid., S. 2 (2).

² Ibid., Schedule, Part III.

⁴ Ibid., S. 2 (1).

⁶ Ibid., S. 3 (1).

(i) *Actions in personam.*

An action *in personam*, better called an action *inter partes*, is one that is brought in order to settle the rights of the parties as between themselves, but only between themselves, whether it relates to an obligation or, as in the case of detinue, to chattels. In the words of Holmes J.:

Meaning of action *in personam*

'If the technical object of the suit is to establish a claim against some particular person . . . or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to, or the possession of, a tangible thing.'¹

English law bears out another statement of Holmes J., that 'the foundation of jurisdiction is physical power'.² The exercise of this power takes the form of summoning the defendant to appear before the court to answer the plaintiff's claim, and the rule, subject to certain statutory exceptions to be considered later,³ is that no action *in personam* can be brought against him unless he has been served personally in England or Wales with a writ of summons or with an originating summons.⁴

Jurisdiction exists only if defendant present in England or Wales

'The root principle', said Lord Haldane, 'of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ and can be compelled consequently to submit to the decree made is a person over whom the courts have jurisdiction.'⁵

A writ cannot be served abroad, except with the leave of the court in a few cases permitted by statute,⁶ and therefore the rule is that the court possesses jurisdiction over the defendant to an action *in personam* if he is present in England or Wales, but not otherwise. He must be here. Nothing else suffices. The fact that England is the *forum domicilii* or the place where a contract has been made, a tort committed or a business carried on by an individual person is insufficient at common law to

¹ *Tyler v. Judges of the Court of Registration* (1900), 175 Mass. 71.

² *McDonald v. Mabee* (1917), 37 Sup. Ct. 343; *Cheatham*, op. cit., p. 96; *Michigan Trust Co. v. Ferry* (1913), 33 Sup. Ct. 550; *Lorenzen*, op. cit., p. 59; *In re The Indiana Transportation Co.* (1917), 244 U.S. 256.

³ *Infra*, pp. 111-22.

⁴ Substituted service is possible, but not if the defendant was abroad at the time when the original writ was served, *Wilding v. Bean*, [1891] 1 Q.B. 100.

⁵ *John Russell & Co. Ltd., v. Gayzer, Irvine & Co. Ltd.*, [1916] 2 A.C. 298, 302.

⁶ *Infra*, pp. 111-22.

found jurisdiction over an absent defendant. The same general rule applies to a foreign company, in which case the transaction of business in England by its agents is the equivalent of its presence in England.¹ But a court which has asserted its power by service of process upon the defendant personally is not rendered incompetent by his subsequent departure from the country.²

Residence
not essen-
tial to found
jurisdiction

Thus, the mere transient presence of a person in England suffices to render him amenable to the jurisdiction of the court. If a writ is served on a Frenchman during his visit of a few hours to Folkestone, an action may then be brought against him in his absence concerning a matter totally unrelated to anything that has occurred in England.³ Not only is the justice of this exercise of power suspect, but in many cases it will be ineffective, for a judgment given in the action will be a *brutum fulmen* unless followed by proceedings in France for its enforcement, and a French court can scarcely be expected to recognize a jurisdiction based upon such flimsy grounds. This English doctrine, found in no Continental country except Italy,⁴ is inevitable in domestic law because of the procedural significance of the writ of summons, but it is unfortunate from the point of view of private international law that no jurisdictional distinction is drawn between presence and residence.⁵

Exceptional
case of
agreement
to submit
to the
jurisdiction

Despite this fundamental principle that the court cannot entertain an action against a defendant who is absent from England, it has long been recognized that any person may contract, either expressly or implicitly, to submit to the jurisdiction of a court to which he would not otherwise be subject.⁶ Thus, in the case of an international contract it is a common and extensive practice for the parties, one or even both of whom

¹ *The Lalandia*, [1933] p. 56; *The Holstein*, [1936] 2 All E.R. 1660. As to the meaning of transaction of business, see *infra*, p. 200.

² Cp. the American case of *Michigan Trust Co. v. Ferry* (1913), 33 Sup. Ct. 550, op. cit. Lorenzen, p. 59.

³ Cp. *Garrick v. Hancock* (1895), 12 T.L.R.; *infra*, p. 642.

⁴ Wolff, op. cit., p. 65.

⁵ The Foreign Judgments (Reciprocal Enforcement) Act, 1933, whose object it is to facilitate the enforcement in England of judgments obtained abroad, specifies the residence, not the mere presence, of the defendant in the foreign country as one of the circumstances sufficient to found the jurisdiction of a court of that country.

⁶ *Feyerick v. Hubbard* (1902), 71 L.J., K.B. 509; *Copin v. Adamson* (1875), 1 Ex. D. 17, *infra*, p. 644. Cp. the Scots doctrine of prorogated jurisdiction, Duncan and Dykes, *Principles of Civil Jurisdiction*, pp. 255-62.

are resident abroad, to agree that any dispute arising between them shall be settled by the English court or by an arbitrator in England.¹ A party to such a contract, having consented to the jurisdiction, cannot afterwards contest the binding effect of the judgment. Such an agreement is recognized and made effective by the following rule of court.

'The parties to any contract may agree (a) that the High Court of justice shall have jurisdiction to entertain an action in respect of such contract, and, moreover or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract.'²

(Submission, however, is not effective unless the cause of action is one that the court is competent to deal with, for the parties cannot confer upon the court a jurisdiction that by the rules of English private international law it does not possess. Thus an agreement between a husband and wife domiciled abroad that a suit for the dissolution of their marriage shall be brought in England is unavailing, since at common law divorce jurisdiction resides exclusively in the court of the domicile.³)

(ii) Actions *in rem*.

In Roman law an action *in rem* was one brought in order to vindicate a *jus in rem*, i.e. a right such as ownership available against all persons, but the only action *in rem* known to English law is that which lies in an Admiralty court against a particular *res*, namely a ship or some other *res*, such as cargo, associated with the ship.⁴ To take one instance, the rule has long been, that a maritime lien attaches to and remains enforceable against a ship that collides with and injures another. Such a lien 'is a privileged claim upon a vessel in respect of service done to it

The Admiralty action, against a ship

¹ *Infra*, pp. 221-2.

² R.S.C. Order 11. R. 2 (a).

³ There is another and more general sense in which a person may submit to a jurisdiction to which he is not amenable, i.e. where a person abroad enters an appearance to an action already *sub judice*, but to which he has not been made a party, see e.g. *Re Dulles' Settlement Trusts* (No. 2), [1951] Ch. 842, *infra*, p. 647. If he appears in order to fight the case on its merits, he is bound by the judgment, *aliter* if his object merely is to protest against the jurisdiction, *Voinet v. Barrett* (1885), 55 L.J. (Q.B.) 39, at p. 42 *per* Bowen L.J.; *Tallack v. Tallack*, [1927] p. 211; *Goff v. Goff*, [1934], p. 107. Since appearance will have been entered through an agent in England, this submission is no exception to the general rule concerning jurisdiction.

⁴ The owner and other persons interested are also made defendants. The action also lies against an aircraft, Administration of Justice Act, 1956, S. 3 (3).

or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*.¹ That the ship is the defendant in an action brought to enforce the lien is underlined by the legal process available to the plaintiff. After obtaining the issue of a summons *in rem*, he may procure a warrant for the arrest of the ship which is then affixed by the Admiralty Marshal to the mainmast, being later replaced by a true copy.

‘The action is *in rem*, that being, as I understand the term, a proceeding against a ship or other chattel in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold under the authority of the court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims.’²

If a sale is ordered, the judgment operates *in rem* in the sense that it divests the property in the ship from the owners and confers an absolute title upon the purchaser, good against all persons.³

Jurisdiction depends upon presence in England of the *res*

In this form of action, then, there can be no doubt what constitutes jurisdiction *ratione personae*. The person is the ship, and therefore it is essential that it should be ‘so situated as to be within the lawful control of the State under the authority of which the court sits’.⁴ In a word, the court is competent to entertain the action if the ship lies within the territorial waters of England.

Distinction between action *in rem* and judgment *in rem*

Although this Admiralty proceeding is the only action *in rem* known to English law, it should be observed that the judgment *in rem* in which it results may equally well result from certain actions *in personam*. In the Admiralty action, the court decrees what the status of the ship shall be after its sale, and this decree is binding on all persons. The title to the *res* is now vested in the purchaser. But a ship is not the only *res* whose status may be changed against all persons. A marriage, for instance, is not strictly a *res*, but, as Lord Dunedin remarked,

¹ *The Ripon City*, [1897] P. 226, 242 *per* Gorell Barnes J.

² *The Henrick Björn* (1886), 11 App. Cas. 270, 276–7 *per* Lord Watson. Normally the action lies only against the offending ship, but in the case of certain claims against a ship for which the owner would be liable to an action *in personam*, an action *in rem* may now be brought against any other ship belonging to him; Administration of Justice Act, 1956, S. 3 (4).

³ *Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, [1897] 1 Q.B. 460.

⁴ *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 429, *per* Blackburn J.

it has always been treated as savouring of a *res*.¹ If, therefore, in a proceeding *in personam*, the court adjudges that a marriage shall be dissolved or annulled, its judgment amounts to a declaration that the status of the parties, i.e. their legal position in or with regard to the rest of a community² is now changed.³

In such a case as this, where an action *in personam* terminates with a judgment *in rem*, the existence of jurisdiction *ratione personae* is undoubted, for the respondent will have been served with a writ of summons, but if the case contains a foreign element the further question of jurisdiction *ratione materiae* may arise, namely, is the court, competent though it is to entertain a petition for divorce or for nullity if the respondent has been properly summoned, also competent to give a judgment changing the status of the parties? This is a matter that is better treated later under the relevant topics, but we shall see, for instance, that at common law the English court has no divorce jurisdiction unless the parties are domiciled in England. In other words, the fictitious *res*, the marriage, is deemed to be situated in the country of the domicil.

Among other judgments *in rem* occurring in actions *in personam*, may be mentioned the judgment of a court of probate establishing a will, an adjudication order or an order of discharge made in the course of bankruptcy proceedings, and an order for the dissolution of a company.

(iii) Assumed jurisdiction over actions *in personam*.

The basic principle of English law, that no action *in personam* will lie against a defendant unless he has been served with a writ while present in England or unless he has submitted to the jurisdiction, often precludes a plaintiff from enforcing a claim in what under the circumstances is the most appropriate forum. As we have seen, the fact that a tort has been committed or that a contract has been made and broken in England does not alone render the English court competent, even though the defendant is domiciled and ordinarily resident in the country. Again, if before the issue of a writ an English debtor escapes abroad or if a foreigner returns home after contracting an obligation here, the judicial machinery of England cannot be put in motion. The only remedy of the

¹ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 662.

² *Niboyet v. Niboyet* (1878), 4 P.D. 1, at p. 11, *per* Brett L.J.

³ *Thynne v. Thynne*, [1955] P. 272, 294.

aggrieved party in such cases is to follow the wrongdoer to his place of residence in accordance with the maxim *actor sequitur forum rei*.

Conse-
quent
introduc-
tion of
'assumed'
jurisdic-
tion

Owing to considerations of this nature an entirely new kind of jurisdiction, generally called 'assumed' jurisdiction, was introduced by the Common Law Procedure Act, 1852, which gave the courts a discretionary power to summon absent defendants, whether English or foreign. The exercise of this jurisdiction is now governed by Order 11 of the Rules of the Supreme Court which empowers the court, upon an application to it being made, to permit the service of a writ of summons upon an absent defendant in the circumstances which will be enumerated below. Rule 6 of the Order specifies the method by which service is to be effected. If the defendant is a British subject, no matter in what part of the world he may be, or if he is a foreigner present in 'British Dominions' the writ itself must be served upon him. In all other cases service of notice of the writ is essential. Thus the writ itself must be served upon a defendant in Eire.¹

Discretion-
ary nature
of assumed
jurisdiction

It is essential to appreciate that the right of jurisdiction conferred by this Order differs from that which is recognized at common law, for whether it shall be exercised or not in any given case lies within the discretion of the court. It is a jurisdiction that *may*, not which *must*, be exercised. The Order is not imperative. It merely confers upon the court 'a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for'.² Thus leave to serve a writ will be refused if England is not the *forum conveniens*, as, for example, where the defendant is a foreigner resident abroad and where the circumstances do not justify the expense and inconvenience which he will suffer from a trial in England.³ It has been recognized by the Court of Appeal that if in the circumstances the construction of the Order is at all doubtful it should be resolved in favour of the defendant; and also that, since the application for leave is made *ex parte*, full and fair

¹ *Hume Pipe and Concrete Construction Co. Ltd. v. Moracrete Ltd.*, [1942] 1 K.B. 189.

² *Johnson v. Taylor Bros.*, [1920] A.C. 144, 153, *per* Lord Haldane.

³ *Rosler v. Hilbery*, [1925] 1 Ch. 250, 259; *In re Schintz*, [1926] Ch. 710, 716; *Société Générale de Paris v. Dreyfus Brothers* (1885), 29 Ch.D. 239, 242; *George Monro Ltd. v. American Cyanamid and Chemical Corp.*, [1944] 1 K.B. 432; *The Metamorphosis*, [1953] 1 W.L.R. 543.

disclosure of all the facts is necessary.¹ On the other hand, if it appears probable that the plaintiff owing to political or other reasons will not receive a fair trial abroad, the court may well exercise its discretion in favour of the application for service out of the jurisdiction, even though both parties to the suit are foreigners and even though their rights fall to be governed by foreign law.²

A general criticism which may fairly be directed against the policy of Order 11 is that several of the reasons for which it allows service abroad are not sufficient according to English law to confer jurisdiction upon foreign courts. There is a lack of reciprocity. English courts no doubt expect that judgments delivered by them in virtue of assumed jurisdiction will be universally recognized, yet they are not always prepared to recognize foreign judgments given in similar circumstances. It is obviously undesirable to claim a wider jurisdiction than is conceded to the courts of other countries.³

Criticism
of O. 11

The following are the cases in which, under O. 11, R. 1, an application may be made to the court for leave to serve notice of a writ on an absent defendant in the case of an action *in personam*:

The cases
that fall
under
O. 11, R. 1

- (a) Where the whole subject-matter is land situated within the jurisdiction.⁴ The most obvious example of this is an action for the recovery of land.⁵
- (b) When any act, deed, will, contract, obligation or liability affecting land within the jurisdiction is sought to be construed, rectified, set aside or enforced in the action.⁶

The matters included in this rule are not altogether clear,⁷ but perhaps the nearest approach to a general guide that can be discovered from the few relevant decisions is that what is complained of by the plaintiff must be something that directly affects the land itself, not something which merely affects its value.⁸ It has been held that the rule includes an action against the assignee of a lease for breach of covenant to repair⁹ and a

¹ *The Hagen*, [1908] P. 189, 201; *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646

² *Oppenheimer v. Louis Rosenthal & Co., A.G.*, [1937] 1 All E.R. 23.

³ 16 B.Y.B.I.L., p. 96. But see *infra*, pp. 651-3.

⁴ O. 11, R. 1 (a).

⁵ *Agnew v. Usher* (1884), 14 Q.B.D. 78; affirmed S.I.L.T. 752.

⁶ O. 11, R. 1 (b).

⁷ Dicey, p. 187.

⁸ *Casey v. Arnott* (1876), 2 C.P.D. 24.

⁹ *Tassell v. Hallen*, [1892] 1 Q.B. 321.

claim by a tenant of a farm to recover compensation for improvements,¹ but not an action for the recovery of rent.²

- (c) Where any relief is sought against any person or corporation domiciled or ordinarily resident within the jurisdiction.³

This, which is an extensive departure from common law principles, empowers a judge to entertain practically any kind of action⁴ against an absentee, provided that he is domiciled or ordinarily resident in England. The expression 'ordinarily resident' connotes a residence that is habitual as distinct from that which is occasional or temporary.⁵

- (d) When the action is for the administration of the personal estate of any deceased person domiciled within the jurisdiction at the time of his death, or for the execution, as to property within the jurisdiction, of the trusts of any written instrument of which the person to be served is trustee, and which ought to be executed according to the law of England.⁶

The important fact to observe here is that service out of the jurisdiction under the second part of the Rule will not be permitted, unless some property subject to the trust is actually situate in England at the time when leave to effect service is sought. Thus leave was refused where the defendant trustee had sold the entire trust funds and had departed abroad with the proceeds.⁷

- (e) Where the action is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or other relief for or in respect of a breach of contract in the following cases:

- (i) Where the contract is made in England,⁸ and the defendant is neither domiciled nor ordinarily resident in Scotland.

If a quasi-contract arises from something that has occurred in England it is deemed to have been made in England.⁹ The

¹ *Kaye v. Sutherland* (1887), 20 Q.B.D. 147.

² *Agnew v. Usher* (1884), 14 Q.B.D. 78.

³ O. 11, R. 1 (c); O. 71, R. 1.

⁴ *In re Liddell's Settlement Trusts*, [1936] Ch. 365; Dicey, p. 186.

⁵ Cp. *Levene v. Inland Revenue Comrs.*, [1928] A.C. 225, 232. The same expression is used in the Matrimonial Causes Act, 1950, s. 18 (1) (b); see *infra*, p. 389.

⁶ O. 11, R. 1 (d).

⁷ *Winter v. Winter*, [1894] 1 Ch. 421.

⁸ *Bremer Oiltransport G.m.b.H. v. Drewry*, [1933] 1 K.B. 753; *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327. A contract is deemed to have been made where the letter of acceptance is posted; *infra*, pp. 233-4.

⁹ *Roussou's Trustee v. Roussou*, [1955] 3 All E.R. 486; [1955] 1 W.L.R. 545.

principle of English law is that in the case of a contract of employment the master may be sued either in tort or for breach of contract if he neglects his implied duty to take reasonable care for the safety of the servant. If, therefore, the contract is made in England for employment abroad and a breach of the duty occurs abroad, the servant may invoke this part of the rule without being driven to rely on the rule (*ee*) given below which is confined to a tort committed in England.¹

- (ii) Where the contract is made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England, provided that the defendant is neither domiciled nor ordinarily resident in Scotland.²

This part of the Rule is applicable even though the agent has no authority to effect a completed contract. Thus in *National Mortgage and Agency Co. of New Zealand v. Gosselin*³ the London agent of a Belgian firm, who was employed merely for the purpose of obtaining orders, sent the firm's price list to the plaintiff. The plaintiff gave an order which was forwarded by the agent and accepted through the post by the Belgian firm. It was held that the contract had been made 'through' the agent, for, though the final acceptance did not lie with him, he had negotiated its terms.

- (iii) Where the contract is by its terms or by implication to be governed by English law, provided that the defendant is neither domiciled nor ordinarily resident in Scotland.

This means that what is called the *proper law* of the contract⁴ must be English law.⁵

- (iv) Where the action is in respect of a breach which has in fact been committed⁶ in England of a contract *wherever made*, even though the English breach has been preceded by a breach abroad which rendered impossible of performance that part of the contract which ought to have been performed in England.⁷

The latter part of the Rule meets such a case as *Johnson v. Taylor*,⁸ where Swedish sellers failed to ship goods which they

¹ *Matthews v. Kuwait Bechtel Corporation*, [1959] 2 Q.B. 57.

² *The Metamorphosis*, [1953] 1 W.L.R. 543.

³ (1922), 38 T.L.R. 832.

⁴ *Infra*, pp. 213 et seqq.

⁵ *N. P. Kwik Hoo Tong Handel Maatschappij v. Finlay & Co.*, [1927] A.C. 604. *Ocean Steamship Co. v. Queensland State Wheat Board*, [1941] 1 K.B. 402.

⁶ *Cuban Atlantic Sugar Sales Corporation v. Compania de Vapores San Elefesterio Limitada*, [1960] 1 Q.B. 187.

⁷ *Oppenheimer v. Louis Rosenthal & Co.*, A.-G., [1937] 1 All E.R. 23.

⁸ [1920] A.C. 144.

had sold to English buyers under a contract c.i.f. Leeds. Under the Rule as it then stood,¹ leave for service out of the jurisdiction was refused, for, though the failure to deliver the shipping documents represented a breach in England, the substantial breach was the non-shipment of the goods at Stockholm. Under the present Rule, however, leave would be grantable in such a case.

It will be noticed that leave cannot be granted under (e) (iv) unless three conditions are fulfilled: the alleged contract must in fact have been made; it must have been broken; and the breach must have occurred in England. This does not mean, however, that the plaintiff is obliged to satisfy the judge beyond all reasonable doubt that the conditions have been fulfilled, for this would involve an *ex parte* trial of the case on its merits. The governing requirement is that the case should be a proper one for service out of the jurisdiction, and if there is a strong argument for the contention that the three conditions have been fulfilled, there is a proper case for service out of the jurisdiction.²

It has been held that the court in its discretion may grant leave under this sub-section (e) where the plaintiff claims an account against a person abroad, despite the fact that usually the foreign forum is the most convenient place for the production of the relevant books and documents.³

Leave, however, cannot be granted under the Rule if the defendant is domiciled or ordinarily resident in Scotland or Northern Ireland.

(ee) Where the action is founded on a tort committed within the jurisdiction.⁴

It was held in *Kroch v. Rossell et Cie*⁵ that leave to serve notice of a writ under this heading will not be granted if the tort has no substantial connexion with England. In that case:

The plaintiff, who was a foreigner with no English associations or interests, alleged that defamatory statements had been published of him in two foreign daily papers, one Belgian, the other French.

¹ 'The action is founded on any breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction.' The rule as given in the text was substituted in 1911.

² *Vitkovice Horni a Hutni Tezirstvo v. Korner*, [1951] A.C. 869.

³ *International Corporation Ltd. v. Besser Manufacturing Co.*, [1950] 1 K.B. 488.

⁴ O. 11, R. 1 (ee); added in 1920. *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1; *Bata v. Bata* (1948), 92 Sol. Jo. 574.

⁵ [1937] 1 All E.R. 725.

Assuming that the statements were defamatory, it was clear that a tort had been committed within the jurisdiction, for a few copies of the paper had been sold in London, but nevertheless the Court of Appeal refused to allow service out of the jurisdiction on the ground that no question of substance arose in England and that the claim of the plaintiff was essentially one which should be investigated in the foreign countries concerned.¹

Difficulty is sometimes encountered in determining the place where a tort has been committed, but this is a matter that is discussed later.²

- (f) When any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought.³

The courts refuse to grant permission under this Rule unless the substantial and genuine dispute between the parties is whether an injunction against some act in England ought to be granted. The plaintiff cannot found the jurisdiction of the English court by claiming an injunction that is only incidental to the relief that he in fact desires.

Thus, in *Rosler v. Hilbery*,⁴ *X*, a Belgian, had been appointed by a court at Antwerp to act as sequestrator of a Belgian Company which was in liquidation. An English Company which was being wound up owed the Belgian Company £22,500. The English court, upon the application of *X*, ordered the sum to be paid to *Y*, who was *X*'s London solicitor, and instructed him not to part with it until a further order had been made. The plaintiffs, who were Belgians and who claimed to be entitled to the money, brought an action against *X* and *Y* in England, claiming *inter alia* an injunction against *Y* from parting with the money.

The Court of Appeal refused permission to serve *X* in Antwerp, for the real action was against him, and it was only with the view of having this tried in England, instead of in Belgium, that the plaintiffs had claimed an injunction against *Y*.

¹ Distinguish the Canadian case of *Jennerv. Sun Oil Co.*, [1952] 2 D.L.R. 526, where an Ontarian court gave leave for service out of the jurisdiction in an action brought against the owners of a wireless station who were alleged to have defamed the plaintiff by remarks broadcast in America and heard in Ontario.

² *George Monro & Co., Ltd. v. American Cyanamid Corp.*, [1944] 1 K.B. 432; *infra*, p. 293.

³ *Rosler v. Hilbery*, [1925] Ch. 250; *De Bernales v. New York Herald*, [1893] 2 Q.B. 97 N; *Watson v. Daily Record*, [1907] 1 K.B. 853; *Morocco Bound Syndicate v. Harris*, [1895] 1 Ch. 534.

⁴ [1925] Ch. 250.

- (g) When any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.¹

Leave to serve a person abroad may be obtained under this Rule in circumstances that are not covered by any of the previous Rules, as, for instance, when a tort has been committed in a foreign country by two persons jointly, only one of whom is domiciled or ordinarily resident in England.² But leave will not be granted if there are substantial defendants in England and if there will be no real advantage to the plaintiff in joining the persons who are abroad.³ It is also essential that there should be a bona fide action between the plaintiff and the person who is within the jurisdiction, for if that person is joined with the sole object of making a foreigner amenable to the English court, leave will be withheld.⁴ The words 'properly brought' have been inserted for the protection of persons abroad,⁵ for it is a serious matter to expose a foreigner, who owes no allegiance here, to the inconvenience and annoyance of having his rights contested in this country.⁶ The defendant in England must not be a mere dummy, a subordinate and secondary defendant to the person abroad. Thus in *Witted v. Galbraith*:⁷

A ship belonging to X, a domiciled Scotsman, arrived in the Thames and steps were taken by Y, a London shipbroker, to have her unloaded. The plaintiff's husband, while engaged in unloading, was killed by falling down a hatchway. The plaintiff commenced proceedings against Y for negligence and applied for leave to serve process upon X in Glasgow.

In refusing leave Lindley L.J. said:

"Supposing that both defendant firms were resident within the jurisdiction, would they both have been joined in the action? I cannot think so; there is no plausible cause of action against the brokers. I come to the conclusion that the brokers have been brought into the action

¹ O. 11, R. 1 (g).

² *Croft v. King*, [1893] 1 Q.B. 419.

³ *Chaney v. Murphy*, [1948] W.N. 130; 64 T.L.R. 489.

⁴ *Witted v. Galbraith*, [1893] 1 Q.B. 577; *Rosler v. Hilbery*, [1925] Ch. 250; *In re Schintz*, [1926] Ch. 710; *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16; *Bloomfield v. Serenyi*, [1945] 2 All E.R. 646; *The Brabo* (1947), 63 T.L.R. 130.

⁵ *John Russell & Co. Ltd. v. Cayzer Irvine & Co. Ltd.*, [1916] 2 A.C. 298.

⁶ *Société Générale de Paris v. Dreyfus Bros.* (1885), 29 Ch.D. 239, 242; (1887), 37 Ch.D. 215.

⁷ [1893] 1 Q.B. 577.

simply to enable the plaintiff to bring the other defendants within the jurisdiction. It is not a bona fide cause of action properly brought against a person who has been served within the jurisdiction.¹

A difficult question that was considered by the House of Lords in *The Brabo*¹ is whether leave should be given if the liability of the persons within the jurisdiction is disputed and a substantial doubt exists with regard to the matter. It would seem that the discretion of the court should be exercised in favour of the plaintiff without investigating disputed facts if he has a probable course of action against the persons in England and also perhaps if the issue raises 'an exceptionally difficult and doubtful point of law'.² But if all the facts are set out and are uncontradicted, the court should decide the question of law whether the action would succeed against the parties present in England.

- (h) Where the action is by a mortgagee or mortgagor in relation to a mortgage of *personal property* within the jurisdiction and seeks relief of the following kind, namely, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee; but does not seek (except so far as permissible under (e) above) any personal judgment or order for payment of any moneys due under the mortgage.³

This Rule was framed in order to avoid the decision in *Deutsche National Bank v. Paul*,⁴ where it was held that an action for foreclosure was not covered by clause (e) above, even though the mortgagor had failed to pay the principal and interest due under his personal covenant.

- (i) Where the action is one under the Carriage by Air Act, 1932.⁵

If service abroad has been allowed under one of the heads of Order 11, Rule 1, the plaintiff is not allowed later to add to his statement of claim a claim for another cause of action for which leave to serve a writ out of the jurisdiction would not have been given.⁶

Another case where an action may be brought against persons who are not present in England occurs under Order 48 (a) of the Rules of the Supreme Court,⁷ which applies to partnerships. The Order, after providing that co-partners carrying on

Service of writ on a partnership

¹ *Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo)*, [1949] A.C. 326.

² *Ibid.*, at p. 341, per Lord Porter.

³ O. 11, R. 1 (h) (1916).

⁴ [1898] 1 Ch. 283.

⁵ O. 11, R. 1 (i), 1933, *supra*, p. 11.

⁶ *Waterhouse v. Reid*, [1938] 1 K.B. 743.

⁷ See Dicey, pp. 209-11; Westlake, p. 250.

business in England may be sued in the name of the firm,¹ permits the writ to be served without leave either upon one or more of the partners, or upon the person having control of the business at the principal place of business in England.² Therefore, service which is effected upon the person in control of the English business operates as a valid service upon all the partners, even in the case of a colonial or foreign firm all the members of which are resident abroad.³ Again, service upon one partner resident in England is effective against the co-partners out of the jurisdiction,⁴ and service effected with the leave of the court under Order 11 upon one partner out of the jurisdiction is a good service upon all the other partners out of the jurisdiction.⁵

Conven- Actions that contain a foreign element must frequently
tions re- require the assistance of judicial and administrative officers in
garding other countries, and Great Britain has therefore made conven-
legal pro- tions with a number of States in order to facilitate the conduct
ceedings of legal proceedings in civil and commercial matters. These
regulate such matters as the service of judicial and extra-judicial
documents, the taking of evidence, security for costs, the right
of access to courts, and the right of free legal assistance.⁶

Jurisdic- A final thought must be given to jurisdiction as regards
tion over movables movables situated in England.

The A doctrine of arrestment *ad fundandam jurisdictionem* obtains
foreign in Scotland and in certain Continental countries under which an
doctrine of action may be brought against a person absent from the forum
arrestment if movables situated there and belonging to him have been taken
ad fundan- into the custody of the law at the instance of the plaintiff.⁷ In
-dam juris- Scotland, for instance, if a Sheriff's warrant for the arrestment
-dictionem of property, whether a *chose in action* or a *chose in possession*, is
obtained and executed, the plaintiff may bring any action other
than one relating to status against the absent owner, as for
example an action to recover damages for slander.⁸ Thus the

¹ R. 1.

³ *Worcester City & County Banking Co.*, [1894] 1 Q.B. 784.

⁴ *Lysaght Ltd. v. Clark & Co.*, [1891] 1 Q.B. 552.

⁵ *Hobbs v. Australian Press Association*, [1933] 1 K.B. 1.

⁶ Annual Practice; O. 11, R. 11; O. 37, R. 54.

⁷ For the Scots law see Duncan and Dykes, *Principles of Civil Jurisdiction*, pp. 71-103.

⁸ *Longworth v. Hope* (1865), 3 M. 1049, cited Duncan and Dykes, op. cit., p. 73.

² R. 3.

situation of the movables enables the court to deal with a claim unconnected with them and to deliver a personal judgment against the owner which will be wholly or partially satisfied by their sale.

English law stands aloof from this doctrine. It remains staunch by the principle that 'a court has no power to exercise jurisdiction over anyone beyond its limits'¹ and insists that no action *in personam* will lie against a defendant unless he has been served with a writ while present in England or unless by virtue of some statutory power notice of the writ has been served on him abroad. With one exception Order 11 does not permit service out of the jurisdiction merely because movables of the defendant are found in England, not even if the plaintiff's claim relates to those very movables. The exceptional case is where an action is brought for the execution of an English trust relating to movables in England.² It is, no doubt, a trite saying that an English court has jurisdiction to entertain an action concerning movables in England,³ but even so it is a jurisdiction that is exercisable only against a defendant who has been personally summoned to appear before the court. 'It should rather seem that whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of property a duty or obligation to fulfil the judgment.'⁴ If a foreigner takes a lease of a London house and furnishes it but then remains abroad, the landlord may levy distress upon the chattels in respect of the unpaid rent and presumably may personally re-enter the premises if the lease so provides, but he cannot maintain an action for arrears of rent.

The practical effect of this inability to invoke the jurisdiction of the court depends upon whether the plaintiff's claim is connected with the movables or not. If there is no connexion, as for example where his object is to recover a commercial debt or damages for defamation published abroad, he is remediless in England. It is irrelevant that movables belonging to the defendant are within reach of the court. But if he claims some interest in or right to the movables the position is very different. The action must be brought against some particular person,

The doctrine not known to English law

Practical effect of this refusal to recognize the doctrine

¹ *In re Busfield* (1886), 32 Ch.D. 123, 131 per Cotton L.J.

² Order 11, R. 1 (d); *supra*, p. 114.

³ See, for example, Dicey, Rule 24, p. 173.

⁴ *Schibsy v. Westenholz*, [1870] L.R. 6 Q.B. 155 at p. 163, *per curiam*.

and that person cannot be the absentee, but nevertheless the movables must be in the possession of some person in England and therefore, as Foote remarks, there will 'seldom be any difficulty as to finding a suitable defendant at home, without seeking one abroad'.¹

Suppose, for instance, that a set of Dresden china belonging to Y, a French national domiciled and resident in France, is stored in a London warehouse. The plaintiff, X, an Englishman, alleges that by a contract made in France in the French form he agreed to buy the china and that he paid the price, but that Y refuses to put the goods at his disposal.

X cannot sue Y in the English court for breach of contract, but he can bring an action of detinue against the warehouseman. The latter, having no claim to the ownership of the goods himself and being now faced with two adverse claims to them, can apply for an interpleader summons with a view to making Y a party to the action. If he is successful and if further he obtains the leave of the court to serve notice of the summons on Y in France,² the position as regards jurisdiction is the same as if Y had been served with a writ while present in England. Interpleader relief is not granted unless the applicant undertakes to dispose of the subject-matter of the action in such a manner as the court may order.³ In this indirect manner, therefore, a claim against movables situated in England will normally be sustainable even against a person abroad under whose control they happen to be.

© JURISDICTION TO STAY ACTIONS*

Difficulty
of plurality
of actions

The wide jurisdiction that all sovereign powers arrogate to themselves makes it possible for litigation concerning the same matter to occur contemporaneously in two or more different countries. A person, for instance, who commits a tort in Paris may be sued, not only in France, but also in England if a writ is served upon him during his presence in this country. Again, if a libel is published in a Paris newspaper, a few copies of which have been sold in England, permission to serve notice of a writ upon the defendants may be given under O. 11, R. 1 (e),⁵ notwithstanding that proceedings have already been insti-

¹ *Private International Law* (5th ed.), p. 281.

² R.S.C. Order 11, R. 8A (c).

³ R.S.C. Order 57, R. 2 (c).

⁴ As for the jurisdiction to stay an action in England where the parties to a contract have agreed to refer disputes to a foreign tribunal, see *infra*, p. 222.

⁵ *Supra*, p. 116.

tuted in France. In such cases, however, the English proceedings may be met by the plea of *lis alibi pendens*.

The question that this plea raises is whether the English court will stay an action, either domestic or foreign, on the ground that the applicant is doubly and unnecessarily vexed, since the same cause of action between the same parties is being litigated in a foreign country. If a litigant brings two actions about the same matter in two different courts in England, his conduct is in all cases deemed to be vexatious, and the defendant may demand that he shall elect between the two proceedings.¹ Where, however, one of the actions has been instituted abroad, a party is not necessarily and inevitably put to his election. The English court undoubtedly possesses jurisdiction to stay one of the actions, but it is a discretionary power that is not lightly exercised in favour of a stay.² The question may arise in two different cases, which it will be simpler to keep separate.

Nature of the plea
lis alibi pendens

(i) *The plaintiff in England is plaintiff also in a foreign country.*

It is now established, after a certain amount of doubt, that an English court possesses jurisdiction to stay proceedings at the instance of a defendant who is sued by the plaintiff for the same cause of action in two different countries.³ Since the jurisdiction is *in personam*, it can be exercised in respect of proceedings abroad without flouting the authority of the foreign court. If the plaintiff disobeys an order to discontinue the foreign action, he may be punished for contempt of court.

Courts may stay one of two actions brought by plaintiff

But whether the jurisdiction will be exercised is another matter. The court exercises its discretion with the greatest caution, for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with. It is not sufficient for the defendant merely to show that two actions have been started,⁴ for in the view of the English courts it is not *prima facie* vexatious to commence two actions about the same subject-matter, one here and one abroad.⁵ The reason of this

Jurisdiction to stay action not freely exercised

¹ *McHenry v. Lewis* (1882), 22 Ch.D. 397, 400.

² The Arbitration Act, 1950, s. 4 (2) provides, however, that in certain circumstances the court must stay proceedings taken in respect of a matter upon which a foreign arbitral award has been made, *infra*, pp. 638-40.

³ *McHenry v. Lewis*, *supra*. *Bushby v. Munday* (1821), 5 Madd. 297. *Cohen v. Rothfield*, [1919] 1 K.B. 410, 417, *per* Eve J.

⁴ *Peruvian Guano Co. v. Bockwoldt* (1883) 23 Ch.D. 225, 232, *per* Lindley L.J.

⁵ *Cohen v. Rothfield*, [1919] 1 K.B. at p. 414, *per* Scrutton L.J.

reluctance to exercise the jurisdiction is that, owing to a possible difference between the laws of the two countries, the stay of one of the actions may deprive the plaintiff of some advantage which he is justified in pursuing. Thus, he may have a personal remedy in one country and a remedy only against the goods in another, or a remedy against land in one State but no such remedy in another.¹ Again, where there are several defendants, it may be that a judgment delivered in one country cannot be enforced against them in the other. Further, owing to uncertainty as to the state of the cause lists in the two countries, the plaintiff may have deliberately started the double proceedings with the view of pressing those which are more likely to afford him a speedy decision.²

Defendant
must prove
vexation in
point of
fact

The rule, therefore, is that a plea of *lis alibi pendens* will not succeed and the court will not order a stay of proceedings, unless the defendant proves vexation in point of fact. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. The courts have consistently refused to attempt any general definition of the term 'vexation' in this connexion. Thus, in a leading case Bowen L.J. said:

'I agree that it would be most unwise . . . to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end.'³

Each case, then, depends upon its circumstances, and it is only by way of illustration that the authorities are helpful. It is a simple matter to suggest examples of vexatious proceedings, for example, where the plaintiff to a dispute of a complicated character, involving many witnesses and documents, which is in course of litigation abroad, serves a writ on the defendant while the latter is on a short visit to England,⁴ but in most of the decisions in which the issue has been raised the courts have refrained from exercising their jurisdiction to order a stay of proceedings.⁵

¹ *McHenry v. Lewis* (1882), 22 Ch.D. at p. 401, per Jessel M.R.

² *Ibid.*, at p. 403, per Jessel M.R.

³ *Ibid.*, at pp. 407-8.

⁴ *Logan v. Bank of Scotland*, [1906] 1 K.B. 141, 152, per Gorell Barnes L.J.

⁵ Actions were stayed in the following cases: *Logan v. Bank of Scotland*

- (ii) *The plaintiff in England is defendant abroad, or the defendant in England is plaintiff abroad.*

The fact which distinguishes either of these cases from the one considered above is that the person whom it is sought to stay has not initiated two actions. It follows from this that the courts are even more reluctant to interfere than where the same person is plaintiff in both countries, for the result of a stay of proceedings will be to confine the party stayed to an action of which he is not equally in control.¹ There are, in fact, very few cases in which the jurisdiction has been exercised,² and one judge has ruled that it should not be exercised unless the foreign action is not merely oppressive or vexatious to the applicant, but also is calculated to cause him 'serious if not irreparable damage'.³

1953. *Sealey (orse Callan) v. Callan*⁴ exemplifies the extreme reluctance of the courts to exercise their jurisdiction.

Actions rarely stayed if not brought by same person

Facts:— A wife, resident in England but domiciled in Natal filed a petition for divorce in the High Court under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, which grants jurisdiction to the court if a wife petitioner, though domiciled abroad, is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.⁵ Her husband, who was resident and domiciled in Natal, entered an appearance under protest and later himself began divorce proceedings in the Supreme Court of South Africa. He then applied to the High Court for a stay of the English proceedings.

Formidable objections were advanced against the continuance of the English action. If the wife were to obtain an English divorce, it would not relieve the husband of his married status

(No. 2), [1906] 1 K.B. 141; *In re Norton's Settlement*, [1908] 1 Ch. 471; *Egbert v. Short*, [1907] 2 Ch. 205; *The Christiansborg* (1885), 10 P.D. 141; *The Marinero*, [1955] P. 68.

Actions were *not* stayed in: *Ostell v. Lepage* (1851), 5 De G. & Sm. 95; *McHenry v. Lewis*, *supra*; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch.D. 225; *Hyman v. Helm* (1883), 24 Ch.D. 531.

¹ *Cohen v. Rothfield*, [1919] 1 K.B. 410, 414, *per* Scrutton L.J.; *The Janera*, [1928] P. 55; *The London*, [1931] P. 14; *St. Pierre v. South American Stores Ltd.*, [1936] 1 K.B. 382; *The Madrid*, [1937] P. 40; *The Ithaka*, [1939] 3 All E.R. 630; *Orr-Lewis v. Orr-Lewis*, [1949] P. 347.

² See, for example, *Bushby v. Munday* (1821), 5 Madd. 297; *Armstrong v. Armstrong*, [1892] P. 98.

³ *Orr-Lewis v. Orr-Lewis*, [1949] P. 347, at p. 349, *per* Willmer J.

⁴ [1953] P. 135. See also *Thornton v. Thornton*; *Christian v. Christian* (1897), 67 L.J. (P.) 18; (1886), 11 P.D. 176.

⁵ *Infra*, p. 388.

in the eyes of South African law, since it would not have been granted by the courts of the common domicile of the parties. He would, therefore, be driven to continue the action that he had begun in South Africa and would thus incur much unnecessary expense. It was most desirable, he not unreasonably contended, that from the point of view of international validity, the court of the domicile should be preferred to all others in the matter of divorce.

Nevertheless, it was held that these objections did not warrant a stay of the English action. The husband had failed to satisfy the court that the wife would derive no advantages from suing as plaintiff in England as opposed to defending the South African action. On the contrary, the evidence showed that maintenance, which might be granted to her in the English action, was not obtainable in South Africa. Moreover, after it had become apparent that there was cause for complaint against the wife, there had been a somewhat inexplicable delay in the commencement of the South African proceedings.

1882.
Suggested
distinction
between
colonial
actions and
foreign
actions

The Court of Appeal in *McHenry v. Lewis*¹ suggested a distinction in the present context between courts in the British Empire and foreign courts in the wider sense of the term. It was there said that a plaintiff in English litigation, who commences another action in Scotland or in Ireland or in some other part of the British dominions, is on the same footing as a person who sues for the same matter in two separate courts in England, i.e. the double proceeding is *prima facie* vexatious and one of the actions will be stayed as a matter of course, the plaintiff being put to his election. If, however, the second action is started in a foreign country outside the British dominions, there is nothing inherently vexatious in the double proceeding. It is difficult to appreciate what justification there is for this distinction. The reason invariably advanced by the judges for the proposition that the prosecution of a foreign in addition to an English action is not in itself vexatious is that the litigant may possibly derive some distinct advantage from the foreign proceedings of which it is unjust to deprive him. If this is so, it seems clear that many parts of the British Empire should be ranged with non-British foreign countries, for in parts of the Empire, as, for instance, in South Africa, the rules and remedies are more remote from their English counterparts than those, say, of most of the States in North America. The same observation is true, though to a lesser degree, of Scottish law. More-

¹ (1882), 22 Ch.D. 397.

over, it has now been definitely held in two more recent decisions that the distinction has no application where the foreign suit is brought, not by, but against, the English plaintiff.¹ Thus if *A* sues *B* in Scotland, and then *B* sues *A* in England, *B*'s English action is not prima facie vexatious and will not be stayed in the absence of vexation in fact.² Even where both suits have been brought by the same plaintiff the distinction has not the support of Scrutton L.J.³

¹ *Cohen v. Rothfield*, [1919] 1 K.B. 410; *The London*, [1931] P. 14.

² *The London*, [1931] P. 14; *Heilmann v. Falkenstein* (1917), 33 T.L.R. 383; *The Janera*, [1928] P. 55.

³ *Cohen v. Rothfield*, [1919] 1 K.B. 410, 415.

PART II

PRELIMINARY TOPICS

CHAPTER V. THE PROOF OF FOREIGN LAW

CHAPTER VI. THE EXCLUSION OF A FOREIGN LAW THAT
WOULD NORMALLY BE APPLICABLE

CHAPTER VII. DOMICIL

CHAPTER V

THE PROOF OF FOREIGN LAW

THE established rule is that knowledge of foreign law, even of the law obtaining in some other part of the British possessions, is not to be imputed to an English judge.¹ Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, the presumption is that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference.² If there is no such plea, the court must give a decision according to English law, even though the case may be connected solely with some foreign country.³

Know-
ledge of
foreign
law not
imputed to
English
judges

The question as to what is the foreign law upon some particular matter, like other matters of which no knowledge is imputed to the judge,

‘must be proved, as facts are proved, by appropriate evidence, i.e. by properly qualified witnesses’,⁴

unless both parties agree to leave the investigation to the judge and to dispense with the aid of witnesses.⁵ It cannot be proved, for instance, by citing a previous decision of an English court in which the same foreign rule was in issue,⁶ or by merely pre-

¹ *Nelson v. Bridport* (1845), 8 Beav. 547. In *Saxby v. Fulton*, [1909] 2 K.B. 208, 211, Bray J. said: ‘I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game.’ This is a heresy for which there is neither justification nor support.

² *The King of Spain v. Machado* (1827), 4 Russ. 225, 239; *Male v. Roberts* (1800), 3 Esp. 163.

³ *Warner Bros. v. Nelson*, [1937] 1 K.B. 209.

⁴ *Nelson v. Bridport*, *supra*, per Lord Langdale, at p. 536; *Beatty v. Beatty*, [1924] 1 K.B. 807, 814; *Lazard Bros. & Co. v. Midland Bank*, [1933] A.C. 289. This is by no means a universal law. By German law, for instance, foreign law requires proof only to the extent to which it is unknown to the judge. The judge is not confined to material put before him by the parties, but may use his own sources of information.

⁵ *Jabbour (F. & K.) v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, 147–8. For the Continental and South American practice which allows a judge to make his own investigation, unassisted by witnesses, see *Report of International Law Conference of 1948*, pp. 61–62.

⁶ *Lazard Bros. & Co. v. Midland Bank*, *supra*; *McCormick v. Garnett* (1854),

sending the judge with the text of the foreign law and leaving him to draw his own conclusions,¹ or by referring to a decision in which a court of the foreign country has stated the meaning and effect of the law in question.² *A fortiori*, it cannot be proved by referring to a decision given in some other foreign country.³ Those parts of the United Kingdom, however, for which the House of Lords is the ultimate appellate tribunal form an exception to these rules. Thus Scottish law must be proved by evidence in the courts inferior to the House of Lords, but in the House of Lords itself, which is the *commune forum* of both England and Scotland, it is a matter of which their Lordships have judicial knowledge.⁴ The English courts have not adopted the Continental practice according to which a Government may be requested to give an official statement of the law upon some particular matter. By the British Law Ascertainment Act, 1859, however, a court within Her Majesty's Dominions, which is of opinion that it is necessary or expedient for the disposal of a case to ascertain the law of some other part of Her Majesty's Dominions, may remit to a superior court in the latter place the question of law upon which a ruling is required. A similar course may be taken under other statutes in the case of Protectorates, Mandated Territories, or even foreign countries.⁵

Effect of
the evi-
dence to be
decided by
the judge
alone

Foreign law had formerly to be proved to the satisfaction of the jury, but the Supreme Court of Judicature Act,⁶ 1925, has now provided as follows:

Where it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

What
witnesses
are com-
petent

It is obvious that no witness can speak to a question of law

23 L.J. (Ch.) 777; *In re Marseilles Extension Ry. & Land Co.* (1885), 30 Ch.D. 598, 602. But in *Re Sebba*, [1959] Ch. 166, Danckwerts J. considered that in the circumstances he was justified in departing from this rule.

¹ *Burger v. New York Life Assurance Co.* (1927), 96 L.J. (K.B.) 930, 940.

² *Beatty v. Beatty*, [1924] 1 K.B., at pp. 814-15; *Guaranty Trust Company of New York v. Hannay & Co.*, [1918] 2 K.B. 623, 638, 667.

³ *Callwood v. Callwood*, [1960] A.C. 659.

⁴ *Elliot v. Joicey*, [1935] A.C. 209, 236.

⁵ Foreign Jurisdiction Act, 1890, s. 5, Sched. 1 (British Protectorates and Mandated Territories); Foreign Law Ascertainment Act, 1861 (foreign countries). A remission must not be made under these Acts unless these provisions have been extended by Order in Council to the foreign country in question.

⁶ S. 102, replacing Administration of Justice Act, 1920, s. 15. The Act applies to criminal trials, *R. v. Hammer*, [1923] 2 K.B. 786.

as a fact and that all he can do is to express his opinion. The rule is, therefore, that he must be an expert. The question as to who is a sufficient expert in this matter has not been satisfactorily resolved by the English decisions.¹ Though no doubt the court has a discretion in the matter, the general principle is that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position or follows a calling in which he must necessarily acquire a practical working knowledge of the foreign law. In other words, practical experience is a sufficient qualification. Thus, in accordance with this principle:

Practical
experience
a sufficient
qualifica-
tion

A Roman Catholic bishop was allowed to testify to the matrimonial law of Rome, since a knowledge of its provisions was essential to the performance of his official duties:²

A hotel-keeper in London, a native of Belgium, who had formerly been a commissioner of stocks in Brussels, was admitted to prove the Belgian law of promissory notes, on the ground that his business had made him conversant with mercantile law:³

An ex-Governor of Hong Kong was held competent to prove the marriage law of that colony:⁴

A secretary to the Persian Embassy was allowed to depose to the law of Persia, upon it being shown that there were no professional lawyers in that country, but that all diplomatic officials had to be thoroughly versed in the law:⁵

Where it was necessary to ascertain the meaning of a bill of exchange given in Chile, the evidence of a London bank director with long experience of banking in South America was preferred to that of a young man who had been at the Chilean Bar for four years.⁶

The view taken by the courts is that a mere academic knowledge of foreign law scarcely qualifies a man as an expert witness. Thus in *Bristow v. Sequeville*,⁷ where it was necessary to prove the law in force at Cologne, a witness was called who stated that he was a jurist and legal adviser to the Prussian consul in England, and that having studied law at Leipzig University he knew from his studies there that the Code

Academic
knowledge
not a suffi-
cient quali-
fication

¹ Falconbridge, op. cit., pp. 833-8.

² *The Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; distinguish *R. v. Savage* (1876), 13 Cox C.C. 178.

³ *Vander Donckt v. Thellusson* (1849), 8 C.B. 812; distinguish *Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K.B. 111.

⁴ *Cooper-King v. Cooper-King*, [1900] P. 65.

⁵ *In the Goods of Dhost Aly Khan* (1880), 6 P.D. 6.

⁶ *De Béeche v. South American Stores*, [1935] A.C. 148.

⁷ (1850), 19 L.J., Ex. 289; *In the Goods of Bonelli* (1875), L.R. 1 P.D. 69.

Napoléon applied in Cologne. It was held that he was not a competent witness, Alderson B. saying:

'If a man who has studied law in Saxony, and has never practised in Prussia, is a competent witness, why may not a Frenchman, who had studied the books relating to Chinese law, prove what the law of China is?'

But although it has been said that study alone is not sufficient qualification,¹ the courts have not consistently observed the requirement of practical experience. Thus the Reader in Roman-Dutch Law to the Council of Legal Education, who had made a special study of that law for the purpose of his lectures, was admitted to testify to Rhodesian law;² an English barrister, who in the course of his profession had made researches into the marriage laws of Malta, was held competent to prove the validity of a marriage which had been solemnized at Valetta;³ and in another case evidence as to the law of Chile was admitted from an English solicitor who, though never a practitioner in that country, stated that he had considerable experience of its laws.⁴

Court not bound by the evidence The evidence of the expert may exceptionally be given by affidavit, but it is usually given orally, and if so he is of course open to cross-examination. Although he must state his opinion as based upon his knowledge or practical experience of the foreign law, he may refer to codes, decisions or treatises for the purpose of refreshing his memory, but in such an event the court is at liberty to examine the law or passage in question in order to arrive at its correct meaning.⁵ Again, if there is a conflict of testimony between the expert witnesses on either side, the court must place its own interpretation upon the foreign law in the light of the evidence given.⁶ In all cases, in

¹ *In re Turner* (1906), W.N. 27, per Kekewich J.

² *Brailey v. Rhodesia Consolidated Ltd.*, [1910] 2 Ch. 95; and see *Barford v. Barford*, [1918] P. 140.

³ *Wilson v. Wilson*, [1903] P. 157.

⁴ *In the Goods of Whitelegg*, [1899] P. 267.

⁵ *Concha v. Murietta* (1889), 40 Ch.D. 543; *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630, 643; *In re Cohn*, [1945] Ch. 5; see 61 L.Q.R. 340. *De Béeche v. South American Stores Ltd. and Chilean Stores Ltd.*, [1935] A.C. 148, 158-9.

⁶ *Craster v. Thomas*, [1909] 2 Ch. 348, 357; *Trimbey v. Vignier* (1834), 1 Bing. (N.C.) 151; *Di Sora v. Phillips* (1863), 10 H.L.C. 624, 636-42, per Lord Chelmsford; *De Bode's Case* (1844), 8 Q.B. 208, 266; *Lazard Bros. v. Midland Bank*, [1933] A.C. 279, 298.

fact, it is the right and the duty of the court to criticize the evidence.¹

'The witness, however expert in the foreign law, cannot prevent the court using its common sense; and the court can reject his evidence if he says something patently absurd, or something inconsistent with the rest of his evidence, . . . Subject to the above qualification, or rather explanation, the rule that our courts must take the foreign law from the expert witness in that law is universal.'²

¹ *Tallina Laevauhisus (A/S) v. Estonian State S.S. Line* (1947), 80 LL.L. Rep. 99, 108, *per* Scott L.J.; *Rouyer Guillet et Cie v. Rouyer Guillet & Co. Ltd.*, [1949] 1 All E.R. 244.

² *Tallina Laevauhisus (A/S) v. Estonian State S.S. Line*, *supra*, *per* Scott L.J.

CHAPTER VI

THE EXCLUSION OF A FOREIGN LAW THAT WOULD NORMALLY BE APPLICABLE

1. Foreign revenue laws. *Pages* 136-8.
2. Foreign penal laws. *Pages* 138-54.
3. Foreign laws repugnant to English public policy. *Pages* 154-63.

Impossi-
bility of
recogniz-
ing all
foreign
laws

IT is obvious that circumstances will occasionally arise in which the *lex fori* must be preferred to the foreign law that would normally be applicable to the case. An outstanding example of this is the Continental doctrine of *ordre public* under which any domestic rule designed to protect the public welfare must prevail over an inconsistent foreign rule. The danger of a doctrine so vague as this is that it may be interpreted to embrace such a multitude of domestic rules as to provide a fatally easy excuse for the application of the *lex fori* and thus to defeat the underlying purpose of private international law.¹ The analogous English doctrine, though less unruly, is indeed not above suspicion in this respect. Summarily stated, it withholds all recognition from any foreign law or judgment which is repugnant to the distinctive policy of English law, and it refuses to enforce any foreign law which is of a penal or revenue nature.

We will now deal separately with these three cases.

D Foreign revenue laws.²

Foreign
taxes not
recoverable
by action

Although it has been generally accepted, at any rate since the time of Lord Mansfield,³ that no action lies in England for the enforcement of a foreign revenue law, authority for the proposition long remained a little nebulous, since until recently the issue had been raised on only two occasions. In 1909, the Municipal Council of Sydney sued to recover a contribution imposed by a local statute in respect of certain street improvements

¹ See the remarks of Baty, *Polarized Law*, p. 170.

² See especially 3 *I. & C.L.Q.* 465 et seqq. (Michael Mann); and the judgment of Kingsmill Moore J. in the Irish case of *Peter Buchanan Ltd. & Macharg v. McFey*, now reported [1955] A.C. 516. See also 30 *B.Y.B.I.L.* 459-65.

³ *Holman v. Johnson* (1775), 1 Cowp. 341, 343.

effected in the area where the defendant owned property;¹ in 1928, the Dutch Government claimed the right to have succession duty deducted from the English assets of a Dutch national who had died domiciled in Holland.² Both these attempts failed, but in each case the decision was that of a judge of first instance and the suspicion lingered that if the occasion were to arise a higher court might take a different view of the matter. Finally, all doubts were stilled in 1955 by the decision of the House of Lords in *Government of India v. Taylor*,³ where the facts were as follows: 1955.

The Delhi Electric Supply and Traction Co. Ltd., which was a company registered in England but carrying on business in India, sold its business to the Indian Government for a sum of money which it remitted to England as soon as received. After the company had gone into voluntary liquidation, a demand was made upon it by the Indian Commissioner of Income Tax for the payment of a large sum of income tax in respect of the capital gain derived from the sale of the business. The commissioner claimed to prove for this debt in the liquidation, but his claim was rejected by the liquidator. Vaisey J. and the Court of Appeal having upheld this rejection,⁴ the matter was taken to the House of Lords.

It was argued for the appellants that the alleged rule excluding the recognition of foreign revenue laws did not extend to taxes similar to those imposed in England, but was confined to penal laws, and that in any event it demanded modification in the case of a foreign country belonging to the British Commonwealth of Nations. Further, it was said that the rule, even if accepted *in toto*, did not apply to liquidation proceedings, for a liquidator is under a statutory duty to discharge all the 'liabilities' of the company, which is a word of wide import not confined to debts directly enforceable by action.

These arguments were rejected. Their Lordships were unanimous in holding that the rule expressed by Lord Mansfield rested on a solid basis of authority and convenience. They also held, with one dissentient,⁵ that the duty of a liquidator in the winding up of a company is confined to the discharge of such liabilities as are legally enforceable.

¹ *Municipal Council of Sydney v. Bull*, [1909] 1 K.B. 7.

² *In re Visser*, [1928] 1 Ch. 877.

³ [1955] A.C. 491.

⁴ Decision of the Court of Appeal *sub nom. In re Delhi Electric Supply & Traction Co. Ltd.*, [1954] Ch. 131.

⁵ Lord Keith.

Foreign
revenue
law,
though not
enforceable
may be
applicable

This rule that no action will lie at the instance of a foreign State to enforce a revenue law does not mean, despite what Lord Mansfield said in *Holman v. Johnson*,¹ that such a law is to be totally ignored.² Refusal to enforce it implies no disclaimer of its lawful existence, and circumstances may require that its existence be recognized. Thus, on the ground that public policy demands the maintenance of harmonious relations with other nations, the courts will not countenance any transaction, such as a fraudulent tax-evasion scheme, which is knowingly designed to violate a revenue law of a foreign and friendly State.³

(2) Foreign penal laws.⁴

Foreign
penal laws
not enforce-
able

It is well settled that an English court will not lend its aid to the enforcement, either directly or indirectly, of a foreign penal law.⁵ The imposition of a penalty normally reflects the exercise by a State of its sovereign power, and it is an obvious principle that an act of sovereignty can have no effect in the territory of another State.

Meaning of
'penalty'

The word 'penalty', however, is equivocal, and if understood without qualification it comprises penalties to the enforcement of which there can be no objection, as for example one incorporated in a commercial contract with the object of inducing the prompt performance of his contract by one of the parties.⁶ What, therefore, is the meaning of the word in the present context? The answer given by the Privy Council in *Huntington v. Attrill*,⁷ the leading English authority on the subject, is that it is limited to a fine or other exaction imposed by the State for some violation of public order of a criminal complexion. The Privy Council, in referring to the rule that such a penalty is irrecoverable, said:

'The rule has its foundation in the well-recognized principle that crimes, including in that term all branches of public law punishable

¹ (1775), 1 Cowp. 341, 343: 'No country takes notice of the revenue laws of another.'

² *Reggazoni v. K. C. Sethia (1944) Ltd.*, [1956] 2 Q.B. 490 at p. 515, per Denning L.J.; [1958] A.C. 301 at p. 319, per Lord Simonds.

³ *In re Emery's Investments Trusts*, [1959] Ch. 410.

⁴ See especially 40 *Transactions of the Grotius Society*, pp. 25 et seqq. (Dr. F. A. Mann), and vol. 42 of the same series, pp. 133 et seqq. (Michael Mann).

⁵ *Folliott v. Ogden* (1789), 3 T.R. 726; *Wolff v. Oxholm* (1817), 6 M. & S. 92; *Huntington v. Attrill*, [1893] A.C. 150; *Frankfurter v. W. L. Exner Ltd.*, [1947] Ch. 629.

⁶ *Huntington v. Attrill*, *supra* at p. 156.

⁷ *Supra*.

by pecuniary mulct or otherwise at the instance of the State Government or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they are committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment for such breaches imposed by the *lex fori*, ought to be admitted in the courts of any other country.¹

Two examples may be given of an attempt to enforce a foreign penal law indirectly.

In the early case of *Folliott v. Ogden*:²

Foreign
penal laws
unenforce-
able in
England

A bond for borrowed money had been executed by *B* in favour of *A*, before the Declaration of Independence by the U.S.A., both parties being British subjects resident in New York. Later, during the war, the State of New York confiscated the property of *A*.

To an action brought by *A* in England after the treaty of peace to recover the money due on the bond, *B* pleaded that *A* had been deprived of his rights under the instrument by the legislature of New York. This plea failed. To have admitted it would have resulted in the enforcement of a penalty imposed in the supposed interest of a foreign sovereign.

A more modern decision to the same effect is *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*,³ where the facts were these:

1935

Facts:— The former King of Spain had bought certain securities with his own money and had instructed that they should be held by a London bank to the order of his agents, the Banco de Vizcaya, a Spanish concern. The Spanish Republican Government later decreed that all his property should be confiscated and that anything deposited with Spanish banks should be delivered to the Treasury. The plaintiffs claimed delivery of the securities from the London bank on the ground that they had a contractual right of recovery by virtue of the instructions given by King Alfonso at the time of the original deposit.

Lawrence J. held that the plaintiffs were not in reality asserting their own contractual rights as they originally existed, but the rights of the Spanish Republic. Therefore their claim failed, since to countenance it would in effect be to enforce an admittedly penal law of the Republic.

It has been held that the English court must itself classify an alleged penal law without regard to the view taken in the

Classifica-
tion of the
foreign rule

¹ *Ibid.*, at p. 156.

² (1789), 3 T.R. 726.

³ [1935] 1 K.B. 140. A similar case is *Frankfurter v. W. L. Exner Ltd.*, [1947] Ch. 629.

foreign country in question, and in accordance with what has already been said must regard nothing as a penalty unless it is

'recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a public informer'.¹

The whole subject is well illustrated by Huntington v. Attrill,² where the facts were as follows:

Facts:—

A New York statute, designed *inter alia* to protect the public against company promoters, provided that the directors of a corporation should be personally liable for its debts upon proof that false reports of its financial condition had been published. Sums recoverable under this provision were payable to creditors in satisfaction *pro tanto* of their claims. A creditor instituted a suit under the statute in a New York court and obtained judgment for a large sum. He later brought an action on the judgment in Ontario. The New York courts had decided that actions brought under the statute were of a penal character.

The Privy Council held, first, that it was for the Ontarian court to put its own interpretation upon the statutory provision, and secondly, that the statute was remedial, not penal, since it permitted a subject to enforce a liability in his own interests and for the protection of his own private rights.

Distinction
between
enforce-
ment and
application
of foreign
law

Finally, it remains to stress that the enforcement of a foreign penal law must be distinguished from its application or recognition.³ Although enforcement will not be allowed, it is going too far to assert that 'the penal laws of one country cannot be taken notice of in another'.⁴ This is scarcely true, for subject to the possible intervention of the doctrine of public policy,⁵ such a law must be regarded as operative even in English proceedings if it is part of the foreign legal system which, according to the relevant rule for the choice of law, governs the transaction that is *sub judice*. If, for example, a Ruritanian statute makes the export of certain raw materials a crime punishable by fine and confiscation of property, in no circumstances will the fine be recoverable by an action in England. Nevertheless, if a merchant of Ruritania, by a contract that falls to be governed by the law of that country, agrees to sell the prohibited materials to an Englishman, an action brought against him in England for non-delivery must necessarily fail. The illegality of the con-

¹ Huntington v. Attrill, [1893] A.C. 150, at pp. 157-8.

² [1893] A.C. 150.

³ 42 *Transactions of the Grotius Society*, 135-6.

⁴ Folliott v. Ogden (1789), 3 T.R. 726, *per* Buller J. at p. 733.

⁵ *Infra*, pp. 154 et seqq.

tract, though springing from a crime and from a penal law devoid of extra-territorial effect, cannot be ignored.¹

A somewhat troublesome question is the extent to which foreign expropriatory legislation is recognized in England when it is directed, not against a particular person as in *Don Alfonso's Case*, but against national property generally.² It would seem that legislation of this nature may take three forms: Does foreign expropriatory legislation have extra-territorial effect?

First, *requisition*, which term is generally confined to the seizure of property in the public interest for a limited period, usually until the end of some emergency, and in return for compensation.³

Secondly, *nationalization*, which is the permanent absorption of property into public ownership in furtherance of some political aim and in return for compensation.

Thirdly, *confiscation*, which is the permanent seizure of private property without payment of compensation.

The main question of private international law in this connexion is the extent to which, in the eyes of English law, a decree of a foreign State implementing one of these forms of expropriation affects property belonging either to nationals of that State or to aliens.

The general principles that have a bearing upon the question defy simple harmonization, for against the principles that neither foreign legislation nor foreign penal laws have extra-territorial effect, stands the equally fundamental doctrine that a foreign sovereign cannot be impleaded. If, for instance, the Soviet Government obtains possession in Cardiff of a Russian merchant vessel on the ground that it falls within the scope of a Soviet decree of confiscation and if the decree is not regarded by English law as applicable to property in England, how can Conflicting principles applicable to the question

¹ Cp., for instance, *Zionostenska Banka National Corporation v. Frankman*, [1950] A.C. 57. The same principle affects a foreign revenue law, *supra*, p. 138.

² The literature on this subject is voluminous and is growing; see e.g. Wortley, *Expropriation in Public International Law*; 21 *B.Y.B.I.L.* 180 et seqq.; *Annual Digest and Reports of Public International Cases*, for the various years from 1935 (see indices thereto); 31 *Transactions of Grotius Society*, 30 et seqq.; 13 *M.L.R.* 69 et seqq.; Wolff, pp. 525-9; 75 *L.Q.R.* 188 et seqq. (F. A. Mann); *New York Law Forum*, vol. iv, No. 1, pp. 46-58 (Martin Domke); 22 *Modern Law Review*, 639 (Katzarov).

³ The word *requisition*, while not a term of art, is familiar and has been constantly used to describe the compulsory taking by Government, invariably or at least generally for public purposes, of the user, direction and control of the ship with or without possession, *per* Lord Wright in *The Cristina*, [1938] A.C. 485, 502.

this view be rendered effective against a sovereign power that is immune from the jurisdiction?

Doubtful
whether
ships in a
separate
category

Another obstacle to a simple generalization of the law is the doubt whether all forms of property stand on the same footing for the purpose of determining the effect of expropriation. The suggestion, for instance, by no means unsupported by authority, has been made that a merchant ship stands in a category of its own, since it has a permanent *situs* in the country to which it belongs.¹ If this is correct a State which requisitions or confiscates its national ships exercises a quasi-territorial, not an extra-territorial, act of authority.

Factors
upon
which the
law turns:

If an English judge is required to determine the effect of foreign expropriatory legislation, his decision will depend upon three main factors, namely, the construction of the foreign legislation, the *situs* of the property at the time of the legislative decree, and the question whether the foreign sovereign was in actual possession or control of the property outside his territory at the time when the facts giving rise to the litigation occurred. The present law appears to be as follows.

(1) Property
within the
foreign
jurisdiction
at time of
decree

The English courts recognize without hesitation that the ownership of property is conclusively and finally determined by the terms of the foreign decree of expropriation, if the property is situated within the jurisdiction of the sovereign at the time of the decree, notwithstanding that it is later brought to England and is still there at the time of the action. For instance, in *Luther v. Sagor*:²

Timber, situated in Russia and belonging to the plaintiffs, a private company incorporated according to the law of Russia, was seized by the Soviet authorities under a decree that had nationalized all profits belonging to industrial and commercial establishments. Part of the timber was later brought to England and there sold to the defendants by a Soviet agent. The plaintiffs sued for damages in trover on the ground that the ownership of the timber was still vested in them.

The Court of Appeal, on grounds which were not identical, found for the defendants.³

¹ 31 *Transactions of Grotius Society*, 30 et seqq.

² [1921] 3 K.B. 532, 548. Followed in *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718. *Quaere* whether the decision would be the same if the owner escaped with his property from the country after the decree but before he had been deprived of possession by the local authorities. Cp. *Don Alonso de Velasco v. Corneros* (1612), Hobart 212, also *sub nom.* *Sir John Watts* 2 Brownl. and Golds. 29, cited 13 *M.L.R.* 70, where, however, it is doubtful whether the correct interpretation has been put upon the decision; see Sack, *op. cit.*, pp. 363-4.

³ For a critical appraisalment of the decision see Dr. K. Lipstein in 35 *Trans-*

In the view of Warrington L.J., no sovereign State must sit in judgment upon the acts of another foreign State affecting property within its own territory.

'It is well settled that the validity of the acts of an independent sovereign Government in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country.'¹

Bankes L.J. found it impossible to ignore the law of Russia, the *lex situs* at the time of the decree, under which the seller had acquired a good title to the goods.² Scrutton L.J., following perhaps a more doubtful line of reasoning, argued that, since the doctrine of immunity would have prevented any investigation of the Russian sovereign's title had the timber been found in England in the possession of a Russian official, it followed that no such investigation was possible where possession had been given to a private purchaser. 'What the court cannot do directly, it cannot do indirectly.'³

But surely the simple and decisive justification of the decision is the rule that a title to movables, valid according to the *lex situs* at the time of its acquisition, is recognized by English law.⁴ The law of the *situs* must prevail in such circumstances unless the rule of that law under which the title has been acquired is so immoral or so alien to the principles of justice as understood in England that it must be disregarded as being contrary to public policy. The Court of Appeal considered this objection, but found it impossible to regard the nationalization decree as anything else but the expression of a policy, designed, whether mistakenly or not, to promote the best interests of Russians.

The *lex situs* is decisive

The question is whether the principle of *Luther v. Sagor* applies where the confiscated property, though situated within the jurisdiction of the confiscating State, belongs to aliens. This was the main issue raised in *Anglo-Iranian Oil Co. v. Jaffrate*, better known as *The Rose Mary*,⁵ where the facts were as follows:

Are non-nationals bound by the *lex situs*?

Case of *The Rose Mary*

Fact.—By an agreement made in 1933, the Persian Government granted to the plaintiffs the exclusive concession of extracting petroleum from

actions of the *Grotius Society*, 157 et seqq. For the contrary view of such a case taken in France, see Wortley, *Expropriation in Public International Law*, pp. 18-19.

¹ [1921] 3 K.B. 532, at pp. 548-9.

² *Ibid.*, at p. 545.

³ *Ibid.*, at pp. 555-6.

⁴ See the remarks of Devlin J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, 260.

⁵ [1953] 1 W.L.R. 246.

a certain area in Persia for a period ending on December 31, 1993, and undertook not to alter the agreement by legislation.

In 1951, the Government nationalized and expropriated all property vested in the plaintiffs by the concession. In the view of the judge in the present action this expropriation was accompanied by no more than a vague offer to consider the payment of compensation at some undefined time in the future.

The company formed by the Persian Government to manage the confiscated oil industry sold 400,000 tons of crude oil to an Italian, who in turn sold 900 tons to the Swiss charterers of the vessel, *Rose Mary*. This vessel, loaded with the oil, put into Aden harbour, whereupon the plaintiffs sued the ship-owners, the master and the charterers in detainee claiming either delivery of the oil or a declaration that it was their property.

Campbell J. found for the plaintiffs. *Luther v. Sagor*, in his considered opinion, is confined to a case where the confiscated property belongs to a national of the confiscating State. Public International Law, as incorporated in English law, ordains that to deprive a non-national of his property without the payment of adequate compensation is an illegal act.

'I am satisfied,' he said, 'that, following international law as incorporated in the domestic law of Aden, the court must refuse validity to the Persian Oil Nationalization Law in so far as it relates to nationalized property of the plaintiffs which may come within its territorial jurisdiction. I find the oil in dispute to be still the property of the plaintiffs.'

Two
distinct
questions

This decision must inevitably attract general sympathy, if only on the grounds of natural justice, but nevertheless it is submitted with the greatest respect that it is not beyond reproach, since, as a learned writer has shown in a convincing manner, it fails to distinguish two quite separate issues.² The first is whether the legislative power of a foreign sovereign to confiscate property within his own jurisdiction without the payment of compensation is open to question in the courts of other countries. The second question, presuming that the first must be answered in the negative, is whether, having effectively carried out the act of confiscation, the sovereign is bound by public international law to compensate non-nationals who have been dispossessed of their property.

(a) Is ex-
propriation
effective
though no
compensa-
tion paid?

It seems unarguable that the first question admits of only one answer. On what possible ground can an English court deny the *effectiveness* of legislation passed by a foreign sove-

¹ [1953] 1 W.L.R. 246, 250.

² D. P. O'Connell in 4 *I. & C.L.Q.* 267 et seqq.

reign State, recognized as such by Great Britain, in so far as it affects property situated within its own territorial domain? It is a supreme executive act that cannot be judicially questioned in another country. On principle, recognition of the act must be complete, not partial. It cannot be made to turn upon the nationality of the victim, for even foreigners who choose to submit themselves or their business arrangements to a territorial law must resign themselves to the consequences of a relevant and territorial act of sovereignty.¹ Even on practical grounds the contrary view would avail nothing, for legislative capacity is coincident with power, and short of war no foreigner can resist an act of power exercised within the territorial limits of a sovereign Government. If this truism is accepted, it follows that the right of exploitation in the Persian oilfields had re-vested in the Persian sovereign by virtue of the *lex situs*. Therefore, the ownership of the 900 tons of oil shipped on *The Rose Mary* passed to the Italian buyer, also by virtue of the *lex situs*, and there was no principle of private international law which would justify the divesting of his title by a foreign court. In a later case, Upjohn J. came to the conclusion that *Luther v. Sagor* laid down principles of general application not limited to nationals of the confiscating State, and that the English courts do not regard confiscation without compensation as *per se* a ground for refusing to recognize foreign legislation.²

This, however, does not conclude the matter. It is one thing to recognize that an owner has been effectively dispossessed of his property by a confiscatory decree, another to deny him a personal remedy. It is at this point that the second question becomes relevant—does public international law demand that a sovereign State shall compensate a non-national whom it has dispossessed? Unlike legislative capacity, law is not coincident with power. It is, indeed, difficult to resist the argument that on principle the dispossessed person acquires a contractual or an equitable right to compensation. He cannot succeed in detainment and he cannot demand the remedy of specific perfor-

(b) Is there a contractual right to compensation?

¹ *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 348, per Upjohn J. The learned judge disclaimed any intention to challenge the correctness of the decision in *The Rose Mary*, but perhaps this was because the Persian legislation was aimed at confiscating the property of particular persons (p. 346) as in *Don Alfonso's Case*, *supra*, p. 139. But in that case the property was in England at the time of the confiscatory decree and so out of the reach of the Spanish sovereign. Therefore, the two cases are not *in pari materia*.

² *In re Claim of Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 348. To the same effect, Diplock J. in *Adams v. National Bank of Greece*, [1958] 2 Q.B. 59, at p. 73.

mance, for it is not open to him to deny the validity of the confiscatory legislation, but he casts no reflection upon the right of a sovereign State to dispose of property for the supposed good of the community if he claims that it shall make reparation for any resultant breach of contract. At the lowest, there is an obligation arising *ex aequo et bono* that there should be restitution of the amount by which the State has been unjustly enriched. Speaking of the *Rose Mary Case*, an acute commentator has well said:

'A concessionaire may have his rights *ex contractu* abrogated by unilateral action, but that by no means represents the termination of his equitable interest in the works constructed by him. That interest may be said to give rise to a new obligation, of restitutionary or quasi-contractual character, on the part of the State which benefits from the expropriation. In municipal law effect may be denied to this restitutionary principle by virtue of an act of sovereignty; in international law no such act of sovereignty renders a State competent to destroy the equitable interest of a foreign investor. That interest falls within the category of "acquired right".'¹

There is, in fact, considerable authority for the view that to confiscate the property of a foreign national without making adequate compensation is to commit a wrong according to public international law,² but in the present state of the authorities it would appear that this is a wrong to be rectified by diplomatic intervention rather than by judicial process.

(2) Property outside the foreign jurisdiction at time of decree If the property was outside the territory of the confiscating or requisitioning sovereign at the time of the decree, whether in England, in a foreign country or on the high seas, the first task of the judge is to construe the decree in order to ascertain whether it is in terms confined to property within the jurisdiction or whether it purports to affect property *extra territorium*. It is for the judge to form his own opinion on this question after hearing the evidence of expert witnesses.³

(a) Decree not intended to be extra-territorial If he comes to the conclusion that the decree was neither expressly nor implicitly directed against property in other countries or on the high seas, *cadit quaestio*. This was the substantial ground upon which the House of Lords held in *Lecouturier v. Rey*⁴ that a French statute, by which the

¹ D. P. O'Connell, 4 *I. & C.L.Q.* 270-1.

² Wortley, *Expropriation in Public International Law*, pp. 33-36; 95 et seqq.; 70 *L.Q.R.* 188-90 (F. A. Mann).

³ As was done for instance by Hill J. in *The Jupiter* (No. 3), [1927] P. 122.

⁴ [1910] A.C. 262, 265; *The Jupiter* (No. 3), [1927] P. 122.

Carthusian monks had been expelled from France and deprived of their property, did not disable them from exploiting in England, to the exclusion of the French liquidator, the reputation which the liqueur known as Chartreuse, and which they continued to manufacture in Spain according to a secret formula, had obtained in England. The statute neither expressly nor by implication affected property outside France.

If, on the other hand, the judge comes to the conclusion that the foreign legislation is intended to have extra-territorial operation, the first general principle to be considered is that legislation has no extra-territorial effect. Jurisdiction is coincident with power, and how can power be exerted within the territory of another sovereign?¹ Speaking of a foreign State, it was said in Dicey:

(b) Decree intended to be extra-territorial

'From the point of view of English courts it has no authority to legislate for, or adjudicate upon, things or persons not within its territory, except in virtue of some English rule of the conflict of laws.'²

The clear implication of the territorial principle is that property situated, say, in England cannot be affected by a foreign decree of expropriation and that the rights of the owner remain unimpaired. The only doubt is whether the decree is effective against a national of the foreign State, since historical authority is not lacking for the view that the right to expropriate property may be based upon the allegiance of its owner as well as upon its *situs*.³ Whether this view is correct or not, it has found few adherents in recent years.⁴ Thus in one case Maugham J. held that a Soviet confiscatory decree was ineffective with regard to property in England although the owner was a Russian subject at the time of the decree.⁵ The application of the principle, however, that the legislative power of a State is only territorial, may be frustrated by the impact of the equally well established principle that a foreign sovereign cannot be impleaded, for if the sovereign is in possession or control of the expropriated property, even though it may be in England, how is the owner to enforce his rights? This

¹ Dicey, p. 13. *Jabbour (F. & K.) v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, at p. 150, and authorities there cited.

² Dicey, 5th ed., p. 20.

³ 31 *Transactions of the Grotius Society*, 35 et seqq. (Sir Arnold McNair). It is significant that Dicey conceded to a State the right to legislate for its subjects outside its territory, 6th ed., p. 20.

⁴ But see *Lorentzen v. Lydden & Co.*, [1942] 2 K.B. 202; *infra*, p. 150.

⁵ *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745.

conflict of doctrine requires us to consider the law under two heads,

first, where the foreign sovereign has obtained possession or control of the property,

secondly, where the previous owner or a third party is still in possession.

(i) If
foreign
sovereign
in posses-
sion, decree
is effective

If the property is in England at the time of the proceedings and if at that time it is in the possession or under the control of the foreign State, the dispossessed owner can take no steps to challenge the validity of the expropriation, for to do so would be to implead a foreign sovereign.¹ This is also the position where, although the sovereign is not directly impleaded, 'relief *in rem* is sought in his absence against property owned by him or in his possession or control'.² This rule is a normal example of the doctrine of immunity, but nevertheless it contains the seeds of much injustice, unless the means by which the sovereign has obtained possession are examinable by the court. If, for instance, his consul obtains possession of a ship lying in an English port by over-persuading, threatening or tricking³ the master and recovery is later sought by the owner, is the sovereign to be allowed to say: 'I am in possession, I therefore cannot be impleaded'? If this plea is available to him, the English court in effect admits the extra-territorial operation of a foreign decree and allows it to deprive an owner of property situated in England. Presumably the court would relieve an owner against a forcible seizure of possession, but as the cases stand it is doubtful whether an unduly restricted meaning has not been given to the word 'forcible'.

1938. In *The Cristina*:⁴

facts:-

The Spanish Republican Government requisitioned all ships registered at Bilbao. A ship falling within this category was berthed

¹ *The Cristina*, [1938] A.C. 485; *The Arraiz* [1938], 61 LL.L. Rep. 140; *The El Neptuno* (1938) 62 LL.L. Rep. 7; *The Arantzazu Mendi*, [1939] A.C. 256; *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] Ch. 369.

² *Dollfus Mieg et Compagnie S.A. v. Bank of England*, *supra*, at p. 384.

³ See, for example, *The Abodi Mendi*, [1939] P. 178, where the consul of the Spanish Republican Government was unable to obtain possession of a Spanish ship in an English harbour owing to the firm attitude of the master, an adherent of General Franco. But later, on returning from a walk, the master found that the Republican crew had removed the gangway and were in physical possession of the ship. Since the Republican Government had previously issued a writ *in rem* against the ship and she was in charge of the marshal, this forcible exclusion of the master was held to be a contempt of court.

⁴ [1938] A.C. 485.

at Cardiff. The Spanish consul boarded her, disclosed the requisitioning decree, dismissed the master and put a new master in command. The owners issued a writ *in rem* and claimed possession of the ship.

It was held by the House of Lords that jurisdiction must be declined since the ship was in the possession of a foreign sovereign State. It is arguable, however, that such an eviction of a servant by a State official is nothing more than a forcible invasion of the owner's proprietary rights. Perhaps the decision does not formulate a general rule, for the Law Lords considered that the Republican Government had requisitioned, not confiscated, the ship, and Lord Thankerton was careful to stress that possession had been obtained 'without a breach of the peace'.¹

If property is not in the possession or control of the foreign sovereign at the time of the proceedings and if it was outside the territorial jurisdiction of the sovereign at the time of the expropriatory decree, it is now established, after several dicta to the same effect, that the rights of the owner are unaffected.² A contrary rule would conflict not only with the principle that legislative power is territorial, but also in the particular case of confiscation with the doctrine that the penal laws of another country will not be indirectly enforced in England.³ Since the sovereign is not in possession at the time of the proceedings, the principle that he cannot be impleaded has no application, for until his right of ownership or possession has been admitted or proved it cannot be said that his title is impugned.⁴

Owing to the decision of Atkinson J. in *Lorentzen v. Lydden & Co.*,⁵ however, it was for some time doubtful whether an extra-territorial effect should not be attributed to the requisition, as distinct from the confiscation, of property by a foreign sovereign. It is true, of course, that a requisition differs fundamentally from confiscation. The former is not spoliation, but a reasonable means of meeting a national emergency. But if it is to be allowed a wider effect than is permissible to confiscation, the difficulty remains of determining the category into

(ii) If foreign sovereign not in possession, decree has no extra-territorial effect

Obstacles to treating requisition differently

¹ *Ibid.*, at p. 493.

² *Tallina Laevaukisu (A/S) v. Estonian State S.S. Line* (1947), 80 LL.L. Rep. 99; *Cheshire and Another v. Frederick Huth & Co.* (1928), 79 LL.L. Rep. 262; *Novello v. Hinricksen Edition*, [1951] Ch. 595; *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248.

³ *Frankfurter v. W. L. Exner Ltd.*, [1947] Ch. 629, pp. 636-7.

⁴ *Haile Selassie v. Cable and Wireless Ltd.*, [1938] Ch. 839; *supra*, p. 93.

⁵ [1942] 2 K.B. 202.

which a particular seizure falls. There is no magic in words. To call a seizure a requisition does not make it one. It must satisfy certain tests. It must be for the public good, for a limited time, and compensation must be paid. But the task of a judge required to consider these somewhat elusive and ambiguous factors will not be simple. Is he to apply the ordinary rules of the English law of contract? Is, for instance, a mere promise by the foreign sovereign to retain the property only for a limited time or to pay compensation sufficient to raise the seizure into the higher category? If so, if promise is to be equated with performance, which is a view that has been taken by the French courts,¹ rapacity may indeed be well served. As an Austrian lawyer has said:

'The whole purpose of the non-enforcement of foreign confiscations could be stultified, if the confiscating State were to take the precaution of including some hypocritical assurances of an eventual payment of some nugatory indemnity in its confiscatory decrees.'²

Again, if compensation has been promised or even paid, is its adequacy a relevant factor? If not, what is in effect a forced sale at a derisory price may receive extra-territorial recognition. If, on the other hand, the amount of compensation is to be scrutinized, the practical difficulties will be great and the interference of the court may be regarded as an affront by the foreign sovereign.

*Lorentzen
v. Lydden
& Co.*

Nevertheless, in *Lorentzen v. Lydden & Co.*, Atkinson J. held that a decree of the Norwegian Government, issued on the eve of its escape to England in 1940, requisitioning in return for compensation Norwegian ships lying outside German-occupied harbours, entitled the Government to recover damages for breach of contract from the charterer of one of these ships. In other words, the decree effectively passed the ownership of the *choses in action* situated in England. His main reasons were these: the decree affected only Norwegian subjects; it expressly referred to ships outside Norway; it was not confiscatory in nature; its enforcement was demanded by public policy.³ Thus, the learned judge felt unmoved by the earlier

¹ 13 M.L.R. 73.

² *Ibid.*, at p. 74.

³ This is an unusual application of the doctrine of public policy. 'The judge invokes it, not in order to exclude foreign law which would normally be applicable' (see *infra*, p. 154) 'but to allow foreign law to impose itself although it would normally not be applicable'; Wolff, p. 528. See also the observations of Devlin J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, at pp. 263-4.

decision of the Inner House of the Court of Session in the case of the *El Condado*,¹ where a claim by the Spanish consul to the possession of a vessel at Glasgow, by virtue of a Spanish decree of requisition, was rejected.

This controversy, however, may now be regarded as settled by *Bank voor Handel en Scheepvaart N.V. v. Slatford*,² where Devlin J. followed the Scots decision in preference to that of Atkinson J.

In that case the Dutch Government, at the time when it was exercising sovereign powers in England with the consent of the British Government, issued a decree which entitled it to assume control of any property belonging to persons resident in Holland.

It was held that the rights thus vested in the Dutch Government were not exercisable in respect of a quantity of gold that had been deposited in London in 1939 by a Dutch bank. In the course of his judgment the learned judge said:

'In short, a principle of private international law that allows property legislation to operate in the territory of another country, so far from being a principle which resolves the conflict of laws, will create a conflict which will require the formulation of a new system to settle. There seems to me to be every reason, if the authorities permit it, for giving effect to the simple rule that generally property in England is subject to English law and to none other.'³

The financial troubles that beset the world during the inter-war years have obliged most countries to introduce a system of foreign exchange control, under which dealings in the currencies of other countries are severely restricted. In accordance with the principle which denies extra-territorial operation to legislation, it has been held that a transaction will not be affected by such a currency regulation unless it is subject to the law of the country in which the regulation has been issued.⁴

Effect of
foreign
currency
regulations

The proper law is decisive in this respect, since it may modify or dissolve the contractual bond.⁵ Thus in *In re Claim by Helbert Wagg & Co. Ltd.*:⁶

A loan agreement, to be construed according to German law, was made in 1924 by which an English company agreed to lend to a

¹ (1939), LL.L. Rep. 330.

² [1953] 1 Q.B. 248.

³ Ibid., at p. 260.

⁴ *Rex v. International Trustee*, [1937] A.C. 500; *Kahler v. Midland Bank*, [1950] A.C. 24; *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

⁵ *Kahler v. Midland Bank*, [1950] A.C. 24, at p. 56, per Lord Radcliffe.

⁶ *Supra*.

German company £350,000 with interest at $7\frac{1}{2}$ per cent., the loan to be secured by a mortgage on certain coalfields in Germany. The loan was to be redeemed by January 1945 and payments of principal and interest were to be made in sterling in London.

The borrowers fulfilled their contractual obligations until 1933, when a German moratorium law was passed which required them to make the agreed payments to a Government agency in Berlin in marks instead of in sterling.

At the outbreak of war in 1939, £174,142 was still due under the loan, but the borrowers continued to pay the appropriate amounts in marks to the Government agency and by 1945 had paid the full equivalent in marks of the whole loan, with the result that by the German moratorium law they were discharged from all further liabilities. The question was whether this discharge was effective or whether the lenders could claim to be paid £174,142 in England out of the German assets held by the Administrator of German Enemy Property.

Upjohn J. held that the debt was situated in Germany, since that was the only place in which the debtors resided,¹ but he considered that the test to determine whether the moratorium law applied was not the local situation of the debt, but the proper law to which it was subject. Having found this to be German law, he held that according to English private international law the debt was fully discharged by the moratorium law and that no claim was sustainable against the Administrator. The learned judge admitted that a currency regulation of the proper law will not be recognized if it is of a confiscatory or penal nature, but he came to the conclusion that the moratorium law of 1933 was an honest attempt to solve Germany's economic position and in no sense discriminatory against foreign creditors.

This case must be contrasted with the decision of the House of Lords in *Kahler v. Midland Bank*,² where a currency regulation beyond reproach on economic grounds was recognized, although it had been used as an instrument of oppression. The facts were these:

The plaintiff, a Jew, formerly a Czechoslovakian national but at the time of the action a naturalized American, bought on the London Stock Exchange through a Swiss bank certain Canadian bearer shares. His bank at Prague—the Z Bank—deposited the shares with the Midland Bank in London to be held in safe custody for him. In March, 1939, the Germans overran Czechoslovakia and compelled the plaintiff, as the price of being allowed to leave the country, to transfer to the B Bank at Prague, a tool of the Gestapo, the whole of his securities,

¹ *Infra*, pp. 487-9, 499-501.

² [1950] A.C. 24.

including the Canadian shares. On April 17th, the Z Bank instructed the Midland Bank to transfer the shares into the depot of the B Bank, on the footing that this transfer was made by the order and for the account of the plaintiff.

To an action of detinue brought by the plaintiff for delivery up of the shares, the Midland Bank contended that it was the bailee of the B Bank and that by a currency regulation of Czechoslovakia it was illegal for the B Bank to part with the shares to a 'currency foreigner', such as the plaintiff, without the consent of the National Bank of Czechoslovakia, which consent had been refused.

The plaintiff's action failed, though it was admitted that he was the undisputed owner of the shares. The majority of the House of Lords held in the first place that the proper law of the contract of bailment between the Z Bank and the Midland Bank and of the substituted bailment between the B Bank and the Midland Bank was the law of Czechoslovakia. Their Lordships then invoked the doctrine that proof of a title to immediate possession is a condition precedent to success in detinue, and held that the plaintiff must necessarily fail, since no such title was vested in him failing the consent of the National Bank. The bailment was not terminable at the will of the plaintiff alone.

This decision has been subjected to damaging criticism,¹ and on the private international law plane it certainly provokes two remarks.

First, it seems a little strange that a bailment to a London bank of chattels, which at all material times had been situated continuously in London and which were re-deliverable in London, should have been regarded as a transaction subject to the law of Czechoslovakia.²

Secondly, Lords Simonds,³ Reid⁴ and Radcliffe⁵ repudiated the suggestion that the Czech currency regulation was of a penal or confiscatory nature. Viewed as a general regulation no doubt this was a correct conclusion, but the fact remains that it was used as an instrument of confiscation in the particular case of the plaintiff. The agreement by which he recognized the transfer of his shares to the B Bank was admittedly signed under duress and therefore was not binding upon him. He was a victim of the German persecution,⁶ but

¹ Dicey, *op. cit.*, pp. 821-2; F. A. Mann in the following: 11 *M.L.R.* 479; 13 *M.L.R.* 206-12; *The Legal Aspect of Money*, pp. 372-7; 26 *B.Y.B.I.L.* 280.

² Lord Reid and Lord MacDermott disagreed with the majority on this point.

³ *At. p. 27.*

⁴ *At. p. 47.*

⁵ *At p. 57.*

⁶ *Kahler v. Midland Bank*, [1950] A.C. 24, at p. 30, *per* Lord Normand.

nevertheless in the view of the House of Lords he was precluded by his pleadings from relying upon this argument, since he admitted in his amended statement of claim that he had ratified the letter of April 17th written by the Z Bank to the B Bank. As Upjohn J. said in a later case:

'If it had not been for the difficulties which arose on the pleadings in that case, I do not think the House of Lords would have hesitated to investigate the question whether an exchange control statute passed in 1934 with the genuine object of protecting the State's economy had not by 1946 become an instrument of oppression and discrimination.'¹

It may be said, indeed, that the decision in *Kahler's Case* is exceptional and that it is no authority for the view that the currency regulations of the proper law must be blindly and mechanically recognized, irrespective of their nature or of the use to which they have been put. To quote Upjohn J. again:

'This court must be entitled to consider whether, looking at all the circumstances, the law is so far-reaching in its scope and effect as really to offend against consideration of public policy of this country.'²

③ *Where the foreign law is repugnant to the distinctive policy of English law.*³

Public
policy
relevant to
action in
England

It is a well-established principle that any action brought in this country is subject to the English doctrine of public policy. That this principle is inevitable has been explained by Lord Parker in the following words:

'Whenever the courts of this country are called upon to decide as to the rights and liabilities of the parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored.'⁴

¹ *In re Claim of Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, 352.

² *Ibid.*

³ On this subject see 39 *Transactions of the Grotius Society*, 39-83 (Prof. Kahn-Freund).

⁴ *Dynamit Actien-Gesellschaft v. Rio Tinto Co. Ltd.*, [1918] A.C. 292, 302.

There is a distinctive policy,¹ or what Westlake calls a 'stringent domestic policy',² adopted in this country to which the application of a foreign law must always remain subject. Certain heads of the domestic doctrine of public policy command such respect, and certain foreign laws and institutions seem so repugnant to English notions and ideals, that the English view must prevail in proceedings in this country.

The occasional exclusion of a foreign law on this ground is no doubt inevitable, but the English domestic doctrine of public policy covers a multitude of sins varying in their degree of turpitude, and it is essential to resist the suggestion that an action on a transaction governed by a foreign *lex causae* must necessarily fail because it would have failed had the *lex causae* been English. Judges in the past have now and then expressed somewhat extravagant views on the matter. Thus, for instance, in a restraint of trade case, Fry J. is reported as saying:

Test for deciding whether English public policy is applicable

'It appears to me plain that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to be made somewhere else.'³

The implication of this is that every limb of the domestic doctrine must apply in every action in England. This can scarcely be so. The conception of public policy, is, or should be, narrower and more limited in private international law than in internal law. A transaction that is valid by its foreign *lex causae* should not be nullified on this ground unless its enforcement would offend some moral, social or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exception. In the words of Cardozo J. in a New York case:

'A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the

¹ Wharton, *Conflict of Laws* (3rd ed.), vol. i, s. 4a.

² Westlake (7th ed.), p. 51.

³ *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 369. Actually the governing law in the circumstances of the case was English law. Therefore, of course, the domestic doctrine applied.

individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.¹

The particular rule of public policy that the defendant invokes may be of this overriding nature and therefore enforceable in all actions. Or it may be local in the sense that it represents some feature of internal policy. If so it must be confined to cases where the *lex causae* is English.

To ascertain whether it is all-pervading or merely local, it must be examined 'in the light of its history, the purpose of its adoption, the object to be accomplished by it, and the local conditions'.² Perhaps the most important question to ask in each case is—what is the rule designed to prevent? Presumably, for instance, the policy underlying the rule which invalidates a promise by a servant not to compete against his master in the future is to further the economic well-being of the country by enabling every person freely to exploit in England the trade that he has learnt. If so, only a rigid doctrinaire would claim that this particular rule is of universal application, designed to control relations between masters and servants in other countries.

Example of
contract in
restraint of
trade

Suppose, for instance, an agreement by a Frenchman, made in France and governed by French law, that after leaving his French employer he will not open a competitive business within 100 kilometres of Calais. Suppose also that the agreement is valid by French law.

If the covenantor opens a business at Boulogne and is sued in England for breach of the agreement, it is unthinkable that he should escape liability by invoking the English prohibition of contracts in restraint of trade. The object of the prohibition can scarcely be to protect the interests of French employees. If, on the other hand, he opens a competitive business in Dover, his right to do so must be recognized, for freedom of trade in England is directly affected.³ Similarly, the English attitude towards marriage brokerage contracts and towards conditions in restraint of marriage would appear to reflect a merely local policy.

¹ *Loucks v. Standard Oil Co. of New York* (1918), 224 N.Y. 99; Cheatham (3rd ed.), p. 346 at pp. 349-50.

² Wharton, *Conflict of Laws* (3rd ed.), i. 16.

³ *Warner Bros. v. Nelson*, [1937] 1 K.B. 209.

If the court decides that, having regard to the particular circumstances, the distinctive policy of English law is in truth affected, then the incompatible foreign rule must, indeed, be totally excluded. Some of the older decisions, however, have perhaps tended to invoke the domestic doctrine of public policy in all its ramifications with remorseless determination. Thus in *Grell v. Levy*,¹ a London solicitor made an agreement in France with a Parisian merchant to sue for a debt due to the merchant from an English resident, and it was provided that the honorarium should be one-half of the amount recovered. This agreement, though valid in France, was champertous in the eyes of English law and was held to be illegal. This decision may probably be vindicated on the ground that English law was the *lex causae*, which perhaps was what Erle C.J. meant to indicate when he stressed so forcibly that England was the place of performance.

*Kaufman v. Gerson*² is a more striking example of insularity.

The husband of the defendant had misappropriated money entrusted to him by the plaintiff. By a contract made and to be performed in France the defendant agreed to pay to the plaintiff by instalments out of her own money the full amount misappropriated, in consideration that the plaintiff would refrain from prosecuting the husband for what was a crime by French law. Both the plaintiff and defendant were French nationals domiciled in France; the misappropriation had occurred in France; the contract was valid by French law.

This contract could scarcely be regarded as offensive to some fundamental principle of justice, for, as Dicey remarked, there is nothing particularly reprehensible in allowing a person to escape criminal proceedings at the price of paying full compensation to the sufferer.³ Nevertheless, an action for the recovery of instalments still due was dismissed on the ground that 'to enforce a contract so procured would be to contravene what by the law of this country is deemed an essential moral interest'.⁴ In *Addison v. Brown*,⁵ however, the most recent case on the

¹ (1864) 16 C.B. (N.S.) 73.

² [1904] 1 K.B. 591 (C.A.) reversing Wright J., [1904] 1 K.B. 114. See also *Hope v. Hope* (1857), 8 De G. M. & G. 731, where Turner L.J. went so far as to say that a foreign contract to be enforceable here must 'be consistent with the laws and policy' of England.

³ Dicey (5th ed.), pp. 828-30. The decision was not followed in the Canadian case of *National Surety Co. v. Larsen*, [1929] 4 D.L.R. 918.

⁴ [1904] 1 K.B. 591, at pp. 599-600, *per* Romer L.J.

⁵ [1954] 1 W.L.R. 779.

subject, a less insular interpretation was put upon the reservation of public policy.

A wife sued her husband to recover arrears of maintenance due under a contract that was governed by Californian law. It was expressly agreed that neither party would apply to any court for the variation of the contract and that if in fact it were varied by any court in subsequent divorce proceedings it should nevertheless remain in force as written. Ten years later the husband obtained a divorce in California, and the contract, far from being varied, was incorporated in the judgment.

The contract, since it contained an agreement by the parties to oust the jurisdiction of the court, was contrary to the doctrine of public policy as understood in England, and it was therefore pleaded that the action was not maintainable. Streatfeild J., however, refused to treat this particular segment of the doctrine as being of universal application. He said:

'Although it may be contrary to public policy to oust the jurisdiction of the English courts, I cannot think that it is the public policy of England to oust a plaintiff in the English courts from suing on an agreement, assuming that it is otherwise actionable, on the ground that that agreement purports to oust the jurisdiction of a foreign court.'¹

Summary
of cases
where dis-
tinctive
policy
affected

The problem, therefore, is to classify those cases in which the English court will refuse to enforce a foreign acquired right, on the ground that its enforcement would affront some moral principle the maintenance of which admits of no possible compromise. The following is suggested as the probable classification.

(i) *Where the fundamental conceptions of English justice are disregarded.* The established rule, which will be stated later,² that a foreign judgment cannot be recognized in England if it offends the principles of natural justice, as, for example, if the defendant was denied the opportunity of presenting his case to the foreign court, exemplifies this aspect of English public policy. Another example is the rule that a contract obtained by what the judge regards as coercion is unenforceable in England.³

¹ [1954] 1 W.L.R. 784. It is noticeable that the learned judge treated the agreement in question as one designed to oust the jurisdiction of the Californian courts. Its terms, however, expressly provided that there should be no application to *any* court and that a variation made by *any* court should be disregarded. Could an argument have been founded on this all-embracing formula?

² *Infra*, pp. 674 et seqq.

³ *Kaufman v. Gerson*, [1904] 1 K.B. 591; *supra*, p. 157. Dicey showed convincingly that there was in fact no coercion in that case; Dicey (5th ed.), p. 829.

(ii) *Where the English conceptions of morality are infringed.* It cannot be doubted that a contract or other transaction which is objectionable in English eyes on the ground that it tends to promote sexual immorality¹ will receive no judicial recognition in England, though it may be innocuous according to its foreign *lex causae*. In an early case Wilmot J. said:

‘In many countries a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here upon such a contract which arose in such a country; but that would never be allowed in this country.’²

(iii) *Where a transaction prejudices the interests of the United Kingdom or its good relations with foreign powers.* An example of the first part of the statement is the prohibition of intercourse with an alien enemy.³ In one case, for instance, an English company, owning mines in Spain, made a contract in 1910 for the delivery by instalments spread over a number of years of minerals to a German company.⁴ The contract contained a suspensory clause which provided that in the event of war the obligations of the parties should be suspended during hostilities. The English company brought an action in 1916 claiming a declaration that the contract was not merely suspended but was abrogated by the existence of a state of war between Great Britain and Germany. The objection was taken that this was a German contract and that therefore it fell to be governed by German law. It was argued that illegality according to English law was irrelevant. What had to be shown was that the contract was illegal by German law. It was held, however, that the German character of the contract had no bearing on the question. ‘It is illegal for a British subject to become bound in a manner which sins against the public policy of the King’s realm’,⁵ and it has long been established that the prohibition of intercourse with an alien enemy rests upon public policy.

Support for the second part of our statement may be derived from the rule that it is contrary to public policy as understood in all civilized nations for persons in England to enter into an

¹ See, for example: *Pearce v. Brooks* (1866), L.R. 1, Ex. 213; *Ayerst v. Jenkins* (1873), 16 Eq. 275; *Taylor v. Chester* (1869), L.R. 4 Q.B. 309.

² *Robinson v. Bland* (1760), 2 Burr. 1077, 1084.

³ *Robson v. Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124, 136. *Supra*, pp. 87–88.

⁴ *Dynamit Actien-Gesellschaft v. Rio Tinto Co. Ltd.*, [1918] A.C. 292.

⁵ *Ibid.*, at p. 294, *per* Lord Dunedin.

engagement with the avowed object of causing injury to a friendly Government,¹ as, for example, by raising a loan to further a revolt,² to import liquor contrary to a prohibition law,³ or to export a prohibited commodity.⁴ Such conduct is a breach of international comity and tends to injure the relations of the British Government with friendly powers.⁵

(iv) *Where a foreign law or status offends the English conceptions of human liberty and freedom of action.* The history of the world affords many instances of legal disabilities firmly established in some countries but unknown and even execrated in others. Obvious examples are disqualifications arising from slavery, excommunication, heresy, infamy, civil death, popish recusancy and nonconformity. Happily most of these illustrate the intolerance of a past age, but analogies are not wanting even in the modern world, as is evident from the history of the Nazi régime in Germany. It may be said without hesitation that all disqualifications of this description, which restrict human freedom by penalizing certain classes of the population to the profit of others (what the older jurists called *privilegia odiosa*), have only intra-territorial effect,⁶ for, in the eloquent words of Wharton: 'To stretch international law further would be to engraft on free countries the paralysing restrictions of despotisms.'⁷

It remains to notice a troublesome controversy that may now be relegated with some confidence to a happy oblivion. It concerns the view, sometimes advanced, that a foreign status unknown to English law will not be recognized as such in England, so that, for instance, the relationship arising between the parties to a foreign adoption would have been ignored before the institution was introduced into England in 1927,

¹ *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, [1955] Ch. 37, at p. 52.

² *De Wutz v. Hendricks* (1824), 2 Bing, 314.

³ *Foster v. Driscoll*, [1929] 1 K.B. 470.

⁴ *Regazzoni v. K. C. Sethia* (1944) Ltd., [1958] A.C. 301. For a critical study of this decision, see 21 *Modern Law Review*, 130 et seqq. (F. A. Mann). Cp. *In re Emery's Investments Trusts*, [1959] Ch. 410.

⁵ It has been laid down in America that a contract to bribe officers of a foreign Government, even if not prohibited by the law of the Government, is unenforceable in the courts of the United States; *Oscanyan v. Arms Co.*, 103 U.S. 261, 277, cited in Pollock on Contracts (12th ed.), p. 349, note 77.

⁶ *Somerset's Case* (1772), 20 St. Tr. 1; *Forbes v. Cochrane* (1824), 2 B. & C. 448, 467, per Best J. (Slavery).

⁷ *Conflict of Laws* (3rd ed.), S. 104.

but would be recognized now.¹ This view cannot survive the most perfunctory examination.

In the first place it is wholly incompatible with the fundamental doctrine that a status, once established by the personal law, is of universal application. This doctrine has been elaborated by Scott L.J. in the following well-known passage:

'These elementary reflections lead, as I think inevitably, to the conclusion that universality is the basic principle of status in private international law—both in general and in the intendment of English law; that the particular status brought into existence by the law of country *A* must have attributed to it by country *B* the self-same personal capacity or incapacity, and the self-same rights and duties, which country *A* conferred or imposed upon that person, natural or artificial; and that the courts of country *B* can introduce into that status no exceptions or qualifications unknown to the law of its creation, unless they are bound to do so by some definite and positive rule of municipal law, whether statutory or common law, which prohibits them (as in *Birtwhistle v. Vardill*²) from giving effect to the country *A* status, or commands them to introduce some specific condition or other modification, when asked to apply the consequences which by the law of country *A* would flow from that status in the particular circumstances of the case before them.'³

Secondly, the view does not represent and never has represented English private international law. As Westlake pointed out many years ago,⁴ the title to property of a Scottish *curator bonis*, an official unknown in England, has been admitted in English proceedings.⁵ Legitimation *per subsequens matrimonium* was not introduced into England until 1926, yet for many years before that date the status of persons so legitimated abroad was consistently recognized by the English courts.⁶ Again, polygamy is unknown to domestic English

¹ Dicey (5th ed.), Rule 136, p. 509. At p. 510, he said: 'The law of England will not (*seem*) in England allow any status . . . , so long as it is unknown to English law, to have legal effects so far as regards transactions in England.' This view has been abandoned by the editors in the 6th and 7th editions, see 7th ed., p. 229. In Halsbury, *Laws of England* (3rd ed.), vol. vii, it is said at p. 143: 'The English courts will not, it seems, pay regard to foreign judgments creating a status of a kind not recognized in England.' The view adopted in the 5th ed. of Dicey was accepted by the original American Restatement, but has now been abandoned in the second Restatement, S. 120.

² (1826) 7 Cl. & F. 895.

³ *In re Luck's Settlement Trusts*, [1940] Ch. 864, at p. 894.

⁴ Private International Law (7th ed.), p. 49.

⁵ *Mackie v. Darling* (1871), L.R. 12 Eq. 319.

⁶ *Infra*, p. 428.

law, but nevertheless the status that it creates in countries where it obtains is far from being disregarded in English proceedings.¹

Status
and its
incidents
dis-
tinguish-
able

It is true, of course, as Scott L.J. indicated in the passage cited above, that the consequences and incidents flowing from a particular status, as fixed by the foreign law under which it has arisen, cannot always be allowed full operation in England. In *Birtwhistle v. Vardill*, for instance, the case mentioned by the learned Lord Justice, the claim of a person, lawfully legitimated according to the Scots law of his domicile, to succeed to a fee simple estate was disallowed, since it was an overriding rule that an heir to English land must be *born* in lawful wedlock.² Again, although the status of polygamy is recognized by English private international law, such matrimonial relief as may be incidental to it is not obtainable in England, since the jurisdiction of the High Court in this regard is attuned to a different form of marriage.³

Two
decisions
on the
French
status of
prodigality

The two authorities invoked by those who would disregard a status unknown to English law are *Worms v. De Valdor*⁴ and *In re Selot's Trusts*,⁵ both of which were concerned with the French status of prodigality. By French law, an adviser, *conseil judiciaire*, may be appointed to safeguard the interests of an adult person of extravagant habits. The judgment by which this is done may prohibit the prodigal from compromising claims, borrowing, receiving money, alienating or mortgaging property and bringing or defending actions without the collaboration of his adviser.⁶

In *Worms v. De Valdor*, however, a prodigal was allowed to succeed in an action, brought in his own name and without the collaboration required by French law, for the delivery up of a bill of exchange, on the ground that the identity of the person entitled to sue is a matter of procedure to be determined by the *lex fori*. In the case of *In re Selot's Trusts*, a prodigal

¹ *Infra*, p. 308.

² *Infra*, pp. 435-7.

³ On the distinction between status and its incidents see Graveson in 26 *Journal of Comparative Legislation and International Law* (November 1944), Pt. III, p. 27.

⁴ (1880), 49 L.J. (Ch.) 261.

⁵ [1902] 1 Ch. 488; applied in *In re Langley's Settlement Trusts*, [1961] 2 W.L.R. 41.

⁶ It is sometimes said that partial incapacities of these kinds should not be classified as a status and that therefore they are not caught by the doctrine of universality. This argument was demolished by Westlake, *op cit.*, pp. 48-49. 'But what is status except the sum of the particulars in which a person's condition differs from that of the normal person?'; *ibid.*, p. 49.

successfully recovered a sum of money, again without the collaboration of his adviser, since Farwell J. reached the strange conclusion that the disability imposed by French law was of a penal nature.¹ Neither decision, therefore, is authority for the wider proposition that a status unknown to English law must be ostracized.

¹ The incapacity of suing, far from penalizing the prodigal, is imposed upon him for his own benefit and protection.

CHAPTER VII

DOMICIL

1. The definition of domicil. *Pages 164-70.*
2. General rules. *Pages 170-3.*
3. The acquisition of a domicil of choice. *Pages 173-86.*
4. Domicil of origin and domicil of choice contrasted. *Pages 186-9.*
5. Domicil of dependent persons. *Pages 189-94.*
6. Domicil and nationality. *Pages 194-9.*
7. The position of corporations. *Pages 199-209.*

①. *The definition of 'domicil'.*

The personal law

THE distinction drawn by the post-glossators between real and personal statutes has led to the universal recognition that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or of where the facts giving rise to the question may have occurred.¹ But unanimity goes no further. There is disagreement upon two matters. What is the scope of this 'personal law', as it is called, and should its criterion be domicil or nationality?² In England, however, it has long been settled that questions affecting status are determined by the law of the domicil of the *propositus* and that, broadly speaking, such questions are those affecting family relations and the family property. To be more precise, the following matters are to a greater or lesser extent governed by the personal law:

The essential validity of a marriage.

The mutual rights and obligations of husband and wife, parent and child, guardian and ward.

The effect of marriage on the proprietary rights of husband and wife. Divorce.

The annulment of marriage, though only to a limited degree.

Legitimation and adoption.

Certain aspects of capacity.

Wills of movables and intestate succession to movables.

Domicil of origin and domicil of choice

There are two main classes of domicil: the *domicil of origin* that is communicated by operation of law to each person at birth, i.e. the domicil of his father or of his mother, according

¹ Rabel, i. 101.

² On the respective merits of nationality and domicil see *infra*, pp. 196-8.

as he is legitimate or illegitimate,¹ and the *domicil of choice* which every person of full age is free to acquire in substitution for that which he at present possesses. This distinction relates merely to the acquisition and loss of domicil, not to its effects.

Despite the warning of Sir George Jessel that an absolute definition is impossible,² it is nevertheless essential to ascertain what English law understands by domicil. Since the most important matters that fall within its province relate to the family, it would seem almost axiomatic that the crucial factor in determining its location should be the place where a man's home is established.

Meaning
of 'domicil'

'By domicil', said Lord Cranworth in 1858, 'we mean home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations drawn from foreign writers will very much help you to it.'³

Indeed, it may be said that the earlier English judges were content to equate domicil with home in the sense in which the man in the street, untroubled by legal subtleties, would understand that word. Just over a hundred years ago, Kindersley V.C. propounded a definition that for facile comprehension and application it would be difficult to better.

Former
English
doctrine of
equivalence
of domicil
and home

'That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.'⁴

This short statement stresses the familiar features of a man's permanent home, if that term is used in its popular sense. It must be the result of a voluntary choice, it must not be transient, and the mere fact that the *propositus* is prepared to move to a different country on some future contingency, such as his succession to a family estate, does not render it impermanent. His conjectures as to what he will do if this or that happens are ruled out as irrelevant.

¹ *Infra*, p. 189.

² *Doucet v. Geoghegan* (1878), L.R. 9 Ch.D. 441, 456.

³ *Whicker v. Hume* (1858), 7 H.L.C. 124, 160.

⁴ *Lord v. Colvin* (1859), 4 Drew. 366, 376. Cp. Phillimore's definition, *Commentaries on Private International Law or Comity*, iv. 43: 'a residence at a particular place, accompanied with positive or presumptive proof of continuing it for an unlimited time'.

Domicil no
longer
equivalent
to home in
popular
sense

Unfortunately, however, more recent decisions, while repeating that a permanent home constitutes domicile, have insisted that the word 'permanent' must be given its supposedly literal meaning. They have equated it with 'everlasting', and thus have reached the conclusion that a person who leaves his domicile of origin and settles with his family in another country will not be considered to have changed his domicile unless his intention is never in any circumstances to abandon this new home.¹ Such an intention, though theoretically possible, is almost inconceivable. Few things in human affairs can be everlasting, least of all one's intention, and singular indeed would be the man who could unreservedly warrant that whatever good or evil might befall him he would never return whence he came. If the word 'permanent' is to be used in this context in preference to 'indefinitely', it should at least not be given the incorrect meaning of everlasting. There is no justification for requiring that the intention to settle in a new country must be irrevocable in character.² Nevertheless, it has several times been affirmed, and more than once by the House of Lords, that the present home of a man is not to be equated with domicile if he contemplates some event, however remote or uncertain, which may cause him at some indeterminate time in the future to change his country of residence. If this possibility is present to his mind, even an intention to reside indefinitely in a place is ineffective.³ Thus Lord Cranworth, despite his earlier rebuff to those incapable of understanding their permanent home,⁴ relented five years later and offered his own solution of the riddle.

'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there,

¹ According to the *Shorter Oxford English Dictionary*, 'permanent' is the opposite of 'temporary', and means 'lasting or designed to last indefinitely without change; enduring; persistent'.

² *Gulbenkian v. Gulbenkian*, [1937] 4 All E.R. 618, at p. 637 per Langton J.

³ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 285-6; *Jopp v. Wood* (1865),

⁴ De G. J. & S. 616; *Goulder v. Goulder*, [1892] P. 240; *Winans v. A.-G.*, [1904] A.C. 287; *A.-G. v. Yule* (1931), 145 L.T. 9; *Wahl v. A.-G.* (1932), 147 L.T. 382; *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588. The rigorous theory adopted in these decisions has been applied in South Africa, see Pollak in 50 *South Africa Law Journal*, 465 et seq., and *Johnson v. Johnson* (1931), A.D. 391; *O'Mant v. O'Mant* (1947), S.A.L.R. 26, where it was held that a husband's residence in Rhodesia, where he had established his home after leaving South Africa, could not constitute domicile, because, in the words of the trial judge, 'always at the back of his mind he seems to have had the intention that if [his wife] did follow him he would be prepared to leave any country to which he had gone'.

⁴ *Supra*, p. 165.

without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.¹

This uncompromising attitude is well illustrated by two decisions of the House of Lords, *Winans v. A.-G.*² and *Ramsay v. Liverpool Royal Infirmary*.³ The facts of the former case were these:

Winans was born in 1823 in the United States, where he was continuously engaged in his father's business until 1850. From 1850 to 1859 he went to Russia, where he was employed by the Government in equipping railways and in the construction of gunboats to be used against England during the Crimean War. He married a British subject and appears never to have set foot again in the U.S.A. In 1859 he showed signs of consumption, and, being advised by the doctors to winter in Brighton in England, he reluctantly took rooms at a hotel there, and in 1860 took upon lease two adjoining houses which he connected structurally. He still held these houses at the time of his death. From 1860 to 1870 his practice was to spend four months of the winter at this Brighton residence and the remainder of the year in Russia. From 1870 to 1883 the routine was altered, for he spent more than half of each year in England or Scotland, the rest of the time being divided between Russia and Germany. In 1883 he ceased to visit Russia, and for the next ten years divided his time between Germany, England and Scotland. From 1893 until he died in 1897 he lived entirely in England. Estate duty was paid upon his English fortune of over two million pounds, but the Crown now claimed legacy duty upon a comparatively small amount of property consisting of land in Baltimore, inscribed stock in the U.S.A., and money on deposit in St. Petersburg. Such duty was payable only if he had acquired an English domicile at the time of his death.

The fact that he had resided principally in England for the last thirty-seven years of his life raised a very strong presumption in favour of an English domicile, but there was no direct evidence as to what his intention was, and, as Lord Macnaghten observed, it is necessary in these cosmopolitan days to look very

¹ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 285-6. Contrast Lord Thurlow's view: 'A British man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune; but if he dies in the interval will it be maintained that he had his domicile at home?': *Bruce v. Bruce* (1790), 2 Bos. & Pul. 229, note.

² [1904] A.C. 287.

³ [1930] A.C. 588.

narrowly into the nature of residence before depriving a man of his native domicil. To reach a satisfactory decision in the present case, therefore, there was no alternative but 'to consider what manner of man Mr. Winans was, what were the main objects of his existence, and what sort of a life he lived in this country'. Lord Macnaghten accordingly analysed with some particularity the hopes, projects and daily habits of Mr. Winans. He found that, in addition to the care of his health, Mr. Winans had two objects in life. The first was the construction in Baltimore of a large fleet of spindle-shaped vessels, which, being proof against pitching and rolling, would restore to America the carrying trade of the world and give to her such superiority at sea that she would have nothing to fear from a naval war with Great Britain. The second object was to develop a large property of about 200 acres in Baltimore. On this, wharves and docks were to be constructed for the spindle-shaped vessels, and a large house built in which Mr. Winans intended to live in order that he might take personal command of the whole undertaking. He succeeded in getting control of the property only at the very end of his life, and at the time of his death he was working day and night on the scheme.

Thus, of these two schemes, one was anti-British, the other wholly American. It was true that Mr. Winans had lived in England for thirty-seven years and that he had not even visited America since his departure in 1850, but this quiescence could be explained by his failure to get control of the Baltimore property. Moreover, he led a secluded life, mixed little with English people, and devoted the whole of his time to his health and to the advancement of his schemes. In the result, therefore, Lord Macnaghten held that the domicil of origin in New Jersey had not been lost. He said:

'On the whole I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicil and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated.'

Lord Halsbury found it impossible to infer from the evidence what Mr. Winans' intention was, and he held therefore that the Crown had not discharged its duty of proving a change of domicil. Lord Lindley vigorously dissented. He said:

'Where was Mr. Winans' home—his settled permanent home? He had one and only one, and that one was in this country; and long before

he died I am satisfied that he had given up all serious idea of returning to his native country.¹

(b) *Ramsay v. Liverpool Royal Infirmary*² concerned one George Bowie, who had left a will that was valid if his domicil at death was Scottish but invalid if it was English. The story of his life was uneventful.

Ramsay v. Liverpool Royal Infirmary 1930. A.C.

Facts:- He was born in Glasgow in 1845 and therefore with a Scottish domicil of origin. He gave up his employment as commercial traveller at the age of thirty-seven and refused to do any more work during the remaining forty-five years of his life. But even the idle must be fed, and after residing with his mother and sisters in Glasgow, he moved his residence to Liverpool in 1892 in order to live on the bounty of his brother. At first he lived in lodgings, but moved to his brother's house when the latter died twenty-one years later, and resided there with his sole surviving sister until she died in 1920. He remained there until his own death in 1927.

Thus George lived in England for the last thirty-six years of his life. During that time he left the country only twice, once on a short visit to the U.S.A., on the second occasion to take a holiday in the Isle of Man. Though he often said he was proud to be a Glasgow man, he resolutely refused on several occasions to return to Scotland, even for the purpose of attending his mother's funeral. On the contrary, he had expressed his determination never to set foot in Glasgow again and had arranged for his own burial in Liverpool.

Thus evidence was completely lacking of any inclination, either by words or actions, to disturb a long and practically uninterrupted residence in England. Nevertheless the House of Lords held unanimously that George died domiciled in Scotland. Their Lordships denied that his prolonged residence disclosed an intention to choose England as his permanent home. Rather, they inferred that had his English source of supply failed he would have retreated to Glasgow.

In the result, therefore, the English courts in the present context have succeeded in giving a strained and unnatural meaning to the word 'permanent'. In the course of time the test of intention has been altered fundamentally and for the

Modern meaning of permanent home

¹ [1904] A.C. 287 at p. 300. The decision against the acquisition of an English domicil was virtually that of Lord Macnaghten alone. In the courts below, Kennedy J.; Phillimore J. (83 L.T. (N.S.) 634), Collins M.R.; Stirling L.J. and Mathew L.J. (85 L.T. (N.S.) 508), reached the opposite conclusion without any hesitation.

² [1930] A.C. 588.

worse. At first an intention to reside indefinitely in a place not for a mere special and temporary purpose was regarded as an intention to reside there permanently, *notwithstanding that* it was contingent upon an uncertain event. Nowadays, an intention of indefinite residence is not equivalent to an intention of permanent residence, *if* it is contingent upon an uncertain event. Thus the English conception of domicile corresponds neither with what the ordinary man understands by his permanent home nor with the Continental criterion of habitual residence. This change of attitude lays the law open to criticism in several respects.

Artificiality
of English
conception

One defect, due to the wide field over which the investigation of the court extends, is that the settlement of a disputed question of domicile becomes an unnecessarily complex matter. It is comparatively simple to identify a man's permanent home in the popular sense of the term, but once the relevance of vague hopes or dim expectations of a return to the fatherland is admitted there is no end to the detail that the judge must consider. Often he must review the whole history of a man's life and examine such elusive factors as his fears and aspirations; his hopes, hates and prejudices; his declarations, both written and spoken.¹ It follows that in many cases a practitioner will experience great difficulty in advising his client upon his place of domicile until it has been judicially determined, for the puzzle will be to predict what weight would be given by a judge to the various factors upon which the question turns. There is no common standard, since a fact which appeals to one mind as being of decisive significance, seems of trivial importance to another. The desire of Mr. Winans to return to America in order to construct anti-British ships impressed Lord Macnaghten, but was discarded by Lord Lindley as immaterial. The result is that a man's domicile may remain uncertain throughout his life.

The weight of authority, therefore, supports the following view expressed by Lord Chelmsford in *Moorhouse v. Lord*² and already cited.

'The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence.'

¹ *Infra*, pp. 176 et seqq.

² (1863), 10 H.L.C. 272, 285-6.

Judges, however, conscious that a literal application of this astigmatic doctrine must frequently run counter to the needs of justice and common sense, especially when it is realized that domicile is the governing factor in a variety of different situations, have occasionally shown a welcome readiness to interpret a man's intention in a manner rather less strict.¹ The explanation, no doubt, of this divergence of practice from strict doctrine was given by Cook.² He maintained that 'domicil' should be regarded as a relative term and that what he called the 'single conception' theory, i.e. the theory that domicile has exactly the same meaning for each of the separate situations in which it is relevant, was doomed to failure in practice.³ A judge, he said, must inevitably focus his attention upon the concrete problem before him, otherwise he will neglect the 'social and economic' requirements of the situation.

Disadvantage of the single conception theory

'The meaning given to the symbol "domicil" has varied with the nature of the problem presented: taxation, divorce, intestate succession, &c. In short, what was being decided in any particular case presented for decision was: do the facts of this case show a connexion of this person with the State in question of such a character as to make it reasonable to do the particular thing asked?'⁴

(2) General rules.

There are four general rules that may be briefly discussed. It is a settled principle that nobody shall be without a domicile, and in order to make this effective the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother,⁵ and to a foundling the place where he is found.⁶ This prevails until a new domicile has been acquired,⁷ so that if a person leaves the country of his origin with an undoubted intention of never returning to it again,

Rules of general application
Every person must have a domicile

¹ Among modern decisions see, for example: *Zanelli v. Zanelli* (1948), 64 T.L.R. 556; *Donaldson v. Donaldson* (1949), 65 T.L.R. 233; *Re Lockie* (1950), 44 R. & I. T. 30; *Travers v. Holley*, [1953] P. 246.

² *Logical and Legal Bases of Conflict of Laws*, pp. 194 et seqq. See also *The American Law Institute Proceedings* (1925), iii. 226-31.

³ 'Too broadly generalized conceptions are a constant source of fallacy'; *Lorenzo v. Wirth* (1898), 170 Mass. 596, per Holmes J., cited Cook, op. cit., p. 194.

⁴ Op. cit., p. 196.

⁵ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457.

⁶ Westlake, s. 248; Wharton (3rd ed.), s. 39; Savigny, Guthrie's translation, pp. 87-88.

⁷ *Munro v. Munro* (1840), 7 Cl. & F. 842, at p. 876.

nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country.¹

2. A person cannot have two simultaneous domiciles

Residence differs from domicile

A person cannot have two domiciles. Since the object of the law in insisting that no person shall be without a domicile is to establish a definite legal system by which certain of his rights and obligations may be governed, and since the facts and events of his life frequently impinge upon several countries, it is necessary on practical grounds to hold that he cannot possess more than one domicile at the same time. Confusion is sometimes caused by the use of the words 'domicil' and 'residence' as if they were synonymous. This is not true. A person, indeed, may reside in more countries than one, and there are several matters with regard to which such multiple residence may produce legal results.

Thus the mere residence in England of a domiciled foreigner is sufficient to subject him to the jurisdiction of the English court, a fact which has led to the unfortunate expression *forensic domicile*; and again a foreigner who is resident in the country may become statutorily liable to the payment of income tax.²

But mere residence does not constitute domicile. In addition to residence in a country domicile requires a present intention on the part of the resident to make that country his sole and permanent home.

3. Domicil denotes connexion with a territorial system of law

Domicil denotes the relation between a person and a particular territorial unit possessing its own system of law. It may well be that in a unit such as India different legal rules apply to different classes of the population according to their religion, race or caste, but none the less it is the territorial law of India that governs each person domiciled there, notwithstanding that Hindu law may apply to one case, Mohammedan to another. This was also true of certain Oriental countries such as Egypt, where under the old system of capitulations Englishmen formed separate privileged communities immune from the local jurisdiction and subject in matters of personal status to English law. For a time, however, the judges followed a false trail. They said that an Englishman, though permanently resident in Egypt, did not acquire an Egyptian domicile if he was a member of a privileged community, since the courts and the law to which he was subject were not those of the territorial sovereign

¹ *Infra*, p. 187.

² *Cooper v. Cadwallader* (1904), 5 Tax. Cas. 101.

in whose dominions he resided. To acquire an Egyptian domicil it was said that he must not merely live in a community separate and apart but must merge in the general life of the native inhabitants.¹ This fallacy was finally exposed in *Casdagli v. Casdagli*,² when the House of Lords demonstrated that the law applicable to Englishmen in Egypt was in the true sense of the word the territorial law of Egypt, since it was the law which the sovereign of the domicil allowed to be applied to certain persons domiciled in his territory.

'The *lex domicilii* for these English residents is the general law of Egypt applicable to native Egyptians modified by the provisions of the capitulations and the statute dealing with the Mixed Tribunals.'³

(iv). There is a presumption in favour of the continuance of an existing domicil. Therefore the burden of proving a change lies in all cases upon those who allege that a change has occurred.⁴ This presumption may have a decisive effect, for if the evidence is so conflicting or indeterminate that it is impossible to elicit with certainty what the resident's intention is, the court will decide in favour of the existing domicil.⁵

(4) Burden of proof ✓

(3) *The acquisition of a domicil of choice.*⁶

The two requisites for the acquisition of a fresh domicil are residence and intention. It must be proved that the person in question established his residence in a certain country with the intention of remaining there permanently. Such an intention, however unequivocal it may be, does not *per se* suffice.⁷ These two elements of *factum et animus* must concur, but this is not to say that there need be unity of time in their concurrence. The intention may either precede or succeed the establishment of the residence. The emigrant forms his intention before he leaves England for Australia, the *émigré* who flees from persecution may not form it until years later.

The elements of residence and intention

Since residence and intention must concur they should

Residence

¹ *Casdagli v. Casdagli*, [1918] P. 89, 99.

² [1919] A.C. 145, overruling opinion of Chitty J. in *In re Tootal's Trusts* (1883), 23 Ch.D. 532, and dictum of Lord Watson in *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 445.

³ *Casdagli v. Casdagli*, [1919] A.C. 145, 193, *per* Lord Atkinson.

⁴ *Munro v. Munro* (1840), 7 Cl. & F. 842, 891; *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, 323; *Winans v. A.-G.*, [1904] A.C. 287, 289; *In re Lloyd Evans*, [1947] Ch. 695.

⁵ See, for example, *Winans v. A.-G.*, *supra*, Lord Halsbury's speech.

⁶ The question of capacity to acquire a fresh domicil is discussed *infra*, pp. 193-4.

⁷ *Harrison v. Harrison*, [1953] 1 W.L.R. 865.

logically be examined separately, but it will be found that in practice it is difficult, if not impossible, to keep them in watertight compartments. It is not residence *per se*, but residence accompanied by a certain intention, that constitutes domicile, and since *au fond* the requirement of residence is satisfied by mere presence the crucial inquiry in a contested issue centres upon the mind of the *de cujus*. Strictly speaking, residence is a fact, though a necessary one, from which intention may be inferred.¹

Residence is *prima facie* evidence of domicile This much is clear, however, that a person's residence in a country is *prima facie* evidence that he is domiciled there.²

There is a presumption in favour of domicile which grows in strength with the length of the residence. Indeed, a residence may be so long and so continuous that, despite declarations of a contrary intention,³ it will raise a presumption that is rebuttable only by actual removal to a new place.⁴ A man cannot gainsay the natural consequences of permanent residence in a country by, for example, declaring in his will that he does not intend to relinquish his former domicile in another country.⁵

Length of residence alone is not decisive On the other hand, time is not the sole criterion of domicile.⁶ Long residence does not constitute nor does brief residence negative domicile. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country. In short, the residence must answer 'a qualitative as well as a quantitative test'.⁷ Thus in *Jopp v. Wood*,⁸ where it was held that a residence of twenty-five years in India did not suffice to give a certain John Smith an Indian domicile because of his alleged intention ultimately to return to Scotland, the land of his birth, Turner L.J. commented as follows upon the length of his residence:

'But nothing is better settled with reference to the law of domicile than that the domicile can be changed only *animo et facto*, and although

¹ *Munro v. Munro* (1840), 7 Cl. & F. at p. 877.

² *Bruce v. Bruce* (1790), 2 B. & P. 229, 231; *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198, 201. Especially when he dies there, *President of United States v. Drummond* (1864), 33 Beav. 449.

³ *Stanley v. Bernes* (1830), 3 Hagg. Ecc. 373; *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch.D. 400.

⁴ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 285, at p. 329, *per Dr. Lushington*; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 455.

⁵ *Re Liddell-Grainger's Will Trusts, Dormer v. Liddell-Grainger*, [1936] 3 All E.R. 173.

⁶ *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. at pp. 329-30.

⁷ *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588, 598, *per Lord Macmillan*.
⁸ (1865), 4 De G. J. & S. 616.

residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as "home", imports an abiding and permanent home, and not a mere temporary one.¹

Conversely, brevity of residence is no obstacle to the acquisition of a domicil if the necessary intention exists. If a man clearly intends to live in another country permanently, as, for example, where an emigrant, having wound up his affairs in the country of his origin, sets sail with his wife and family for Australia, his mere arrival there will satisfy the element of residence.²

A brief
residence
may suffice

A striking example of this truth occurred in America:³

A man abandoned his home in State *X* and took his family to a house in State *Y*, about half a mile from *X*, intending to live there permanently. Having deposited his belongings there, he and his family returned to *X*, in order to spend the night with a relative. He fell ill and died there. It was held that his domicil at death was in *Y*.

(ii). It remains now to consider the element of intention.

It is not necessary to discuss further the nature of the intention essential for the acquisition of a new domicil. It will suffice to recall that, at any rate in theory, the intention must be one of permanent residence and that this quality is deemed by the law to be absent if the resident contemplates some event, whether certain or uncertain, the occurrence of which will or might cause him to move his home elsewhere.⁴

Nature of
intention

The traditional statement that there must be a *present* intention of permanent residence merely means that so far as the mind of the *de cujus* at the relevant time was concerned he possessed the requisite intention. The relevant time varies with the nature of the inquiry. It may be past or present. If, for

Time at
which in-
tention is
relevant

¹ A more modern case in which a long-continued residence was held not to constitute domicil was *A.-G. v. Yule* (1931), 145 L.T. 9.

² *Hodgson v. De Beauchesne* (1858), 12 Moo. P.C. 286, 330; *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, 319; 'It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil'; *per* Lord Chelmsford.

³ *White v. Tennant* (1888), 31 West Virginia 790; Lorenzen, p. 13.

⁴ *Supra*, pp. 166 et seqq.

example, the inquiry relates to the domicile of a deceased person, it must be ascertained whether at some period in his life he had formed and retained a fixed and settled intention of residence in a given country. Once this is established, evidence of his subsequent fluctuations of opinion as to whether his choice was wise will be ignored.¹ If, on the other hand, the essential validity of a proposed marriage depends upon the law of *X*'s domicile and if the identity of this law is in doubt, what must be examined is his immediate intention.

Nature of
evidence
from which
intention is
gathered

It is impossible to lay down any positive rule with respect to the evidence necessary to prove intention. All that can be said is that every conceivable event and incident in a man's life is a relevant and an admissible indication of his state of mind. It may be necessary to examine the history of his life with the most scrupulous care, and to resort even to hearsay evidence where the question concerns the domicile that a person, now deceased, possessed in his lifetime.² Nothing must be overlooked that might possibly show the place which he regarded as his permanent home at the relevant time.³ No fact is too trifling to merit consideration.

'There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime.'⁴

Concentration on
a man's
actual state
of mind

In fact, one of the defects of English law is that the evidence adduced in a disputed case of domicile is often both voluminous and difficult to assess. This is the price to be paid for two somewhat irrational features of the English doctrine.

The first is the over-scrupulous manner in which the courts attempt to discover a man's exact intention. The tendency is to investigate his actual state of mind, rather than to rest content with the natural inference of his long-continued residence in a given country. This, indeed, is to set sail on an uncharted sea. As Lord Colonsay said in a leading case:

'There is perhaps no chapter in the law that has from such extensive discussion received less of satisfactory settlement. That is no doubt

¹ *In re Marrett, Chalmers v. Wingfield* (1887), 36 Ch.D. 400.

² *Scappaticci v. A.-G.*, [1955] P. 47.

³ See, for example, the voluminous evidence considered by Chitty J. in *In re Craignish*, [1892] 3 Ch. 180.

⁴ *Casdagli v. Casdagli*, [1918] P. 89, 99, per Swinfen Eady L.J.

attributable to the nature of the subject, including, as it does, inquiry into the *animus* of persons who have either died without leaving any clear record of their intentions, but allowing them to be collected by inference from acts often equivocal; or who, being alive and interested, have a natural tendency to give their bygone feelings a tone and colour suggested by their present inclinations.¹

The second irrational feature is the requirement that for residence in a country to be equated with domicile it must be intended to be permanent. If the mere contemplation by a man of a possible return to his fatherland at some indeterminate time in the future is enough to deprive his present home of the quality of permanence, then of necessity a number of elusive and dubious matters will be admissible in evidence and the stage will be set for a protracted and complicated trial. Nothing must be neglected that can possibly indicate the bent of the resident's mind. His aspirations, whims, *amours*, prejudices, health, religion, financial expectations—all are taken into account. As Lord Atkinson observed with respect to *Winans v. A.-G.*,² 'the tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr. Winans deceased, were all considered as keys to his intention to make a home in England'.³ Again, in *Hoskins v. Matthews*,⁴ we find Turner L.J. saying:

'We have to consider, then, whether Mr. Matthews afterwards abandoned his English domicil and acquired a new domicil in Tuscany, and for this purpose we must examine his movements, his acts, his motives, his family, his fortune and his health, for all these considerations enter into or may enter into the question of his domicil.'

Having regard, therefore, to the roving commission imposed upon the courts, it is not surprising that their decisions exhibit a multiplicity of different factors which have been regarded as *indicia* of intention. Without attempting to give an exhaustive list, it may be useful to observe that at one time and another the following have been regarded as criteria of intention: naturalization,⁵ purchase of a house⁶ or of a burial ground,⁷ the

Examples
of relevant
evidence

¹ *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, at p. 322.

² [1904] A.C. 287; *supra*, p. 167.

³ *Casdagli v. Casdagli*, [1919] A.C. 145, 178.

⁴ (1856), 8 De G. M. & G. 13, 16; *infra*, p. 183.

⁵ *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P.D. 132.

⁶ *D'Etchegoyen v. D'Etchegoyen*, *supra*; *Moorhouse v. Lord* (1863), 10 H.L.C. 272; *Stevenson v. Masson* (1873), L.R. 17 Eq. 78; *In re Craignish*, [1892] 3 Ch. 180.

⁷ *Stevenson v. Masson*, *supra*; *Haldane v. Eckford* (1869), L.R. 8 Eq. 631.

exercise of political rights,¹ the establishment of children in business,² the statutory declaration made by a candidate for naturalization that he intends to reside permanently in the United Kingdom,³ the place where a man's wife and family reside,⁴ departure from a country owing to compulsion of war,⁵ the refusal of a foreign *fiancée* to leave her own country,⁶ statements as to his domiciliary intentions made by a deceased person in his lifetime.⁷ The relative value of many of these considerations was discussed by the House of Lords in *Wahl v. A.-G.*⁸

No one
fact neces-
sarily deci-
sive

Undue stress must not be laid upon any single fact, however impressive it may appear when viewed out of its context, for its importance as a determining factor may well be minimized when considered in the light of other qualifying events. Again, no one fact is of constant value, for every case varies in its circumstances, and what is of decisive importance in one may be of little weight in another.⁹

Declara-
tions of in-
tention are
of little
weight

It is for this reason that it is impossible to formulate a rule specifying the weight to be given to particular evidence. All that can be gathered from the authorities in this respect is that very little reliance can be placed upon declarations of intention, especially if they are oral. The common law rule, that expressions of intention by a living person cannot be received in evidence unless against his own interest, is not necessarily applicable to an issue of domicile,¹⁰ and it is common enough for witnesses to testify to parole declarations made during his life by the person whose domicile is in question. Nevertheless, this kind of evidence, especially when given long after the conversation occurred, is suspect. In the words of Dr. Lushington:

'To entitle such declarations to any weight, the court must be satisfied not only of the veracity of the witnesses who depose to such

¹ *Drewon v. Drewon* (1864), 34 L.J. (N.S.) Ch. 129, 137.

² *Stevenson v. Masson* (1873), L.R. 17 Eq. 78.

³ *Gulbenkian v. Gulbenkian*, [1937] 4 All E.R. 618; distinguish *Wahl v. A.-G.* (1932), 147 L.T. 382.

⁴ *Forbes v. Forbes* (1854), Kay 341; *Aitchison v. Dixon* (1870), L.R. 10 Eq. 589.

⁵ *In re Lloyd Evans*, [1947] Ch. 695.

⁶ *Donaldson v. Donaldson*, [1949] P. 363.

⁷ *Scappaticci v. A.-G.*, [1955] P. 47.

⁸ (1932), 147 L.T. 382.

⁹ *Hodgson v. De Beauchesne* (1858), 12 Moo P.C. 285, 330; *Doucet v. Geoghegan* (1878), 9 Ch.D. 441, 445; *Wahl v. A.-G.* (1932), 147 L.T. 382.

¹⁰ *Bryce v. Bryce*, [1933] P. 83.

declarations, but of the accuracy of their memory, and that the declarations contain a real expression of the intention of the deceased.'¹

The requirement that declarations should contain 'a real expression of intention' deserves emphasis, for it only too frequently happens that they cannot be taken at their face value. They may be interested statements designed to flatter or to deceive the hearer; they may represent nothing more than vain expectations unlikely to be fulfilled; and the very facility with which they can be made requires their sincerity to be manifested by some active step taken in furtherance of the expressed intention.²

'Declarations as to intention', said Lord Buckmaster, 'are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.'³

Even lower in the scale of values is evidence given in the course of the trial by the *de cujus* himself, not of his past declarations, but of his past intention. This must be accepted with very considerable reserve, for on such a personal issue as his own place of domicile he is under a bias that is likely to influence his mind, perhaps even his veracity.⁴ Evidence of past intention

In at least two respects, motive in the sense of the antecedent desire which determines the will to act⁵ is one of the indicia of the intention requisite for the acquisition of a domicile of choice. First, it may throw light upon the question whether the removal to another country was intended to be permanent. It will serve, for instance, to contrast the case of a man who flees to England to escape political persecution in his own country with that of a retired officer who goes to Jersey to avoid heavy taxation. Secondly, it may provide a means of testing the Motive

¹ *Hodgson v. De Beauchesne* (1858), 12 Moo P.C. 285, 325; *In re Liddell-Grainger's Will Trusts*, [1936] 3 All E.R. 173.

² 'The courts naturally are disposed to give less weight to that sort of declaration than to the acts of the testator', *Drevon v. Drevon* (1864), 34 L.J. (N.S.) Ch. 129, 131, *per* Kindersley V.C.

³ *Ross v. Ross*, [1930] A.C. 1, 6. In several cases even written declarations have been disregarded: *In re Martin*, [1900] P. 211 (declaration in mortgage deed); *In re Liddell-Grainger's Trusts*, [1936] 3 All E.R. 173 (declaration in a will); *Wahl v. A.-G.* (1932), 147 L.T. 382 (declaration in naturalization papers).

⁴ *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307, 313; *In re Craignish*, [1892] 3 Ch. 180, 190.

⁵ Markby, *Element of Law*, S. 216, p. 118.

sincerity of a declaration of intention. Thus, if a widower testifies that at the time of his wife's death he and she regarded Scotland as their permanent home, the fact that by Scots law he is entitled to one-half of his wife's property may make his testimony a little suspect.¹

Domicil acquired in fact not nullified by intention to retain former personal law It is important to realize that the only intention relevant to a change of domicile is an intention to settle permanently in a country. Some hundred years ago the view was expressed in *Moorhouse v. Lord*² that such an intention did not suffice to effect a change of domicile if the propositus also intended to retain his former civil status, i.e. to retain his former personal law. 'A man must intend', said Lord Kingsdown, 'to become a Frenchman instead of an Englishman' before it can be said that his domicile has been changed from England to France.³ This is tantamount to saying that despite his permanent settlement in France, an Englishman may effectively remain subject to English law simply by stating that such is his intention or wish. This view, though still sometimes expressed by the uninitiated, has long been abandoned, and the modern doctrine is in no sense doubtful.

'If the intention [to settle in country *X*] exists and if it is sufficiently carried into effect certain legal consequences follow from it, whether such consequences are intended or not and perhaps even though the person in question may have intended the exact opposite.'⁴

One of the legal consequences is that the person in question becomes subject to the law of *X* whether this is his wish or not. It is the inevitable effect of his residence in that country coupled with his intention to remain there without any limit of time.⁵ Thus in one case:

An Englishman, having taken up his residence in Hamburg with the intention of settling there for good, remained there until his death some fifty years later. Upon one occasion, when he came to England for a temporary purpose, he made a will in which he declared that though he intended to return to Hamburg it was not his intention to renounce his domicile of origin as an Englishman.

¹ Cp. *In re Craignish*, [1892] 2 Ch. 180.

² (1863) 10 H.L.C. 272.

³ *Ibid.*, at p. 292.

⁴ *Douglas v. Douglas* (1871), L.R. 12 Eq. 617, 644-5, *per* Sir John Wickens V.C.

⁵ 'The object of the law in searching for and ascertaining a man's domicile is to ascertain the particular municipal law by which his private rights are regulated and defined'; *In re Craignish*, [1892] 2 Ch. 180 at pp. 188-9, *per* Chitty J.

It was held that this declaration, which suggested a desire to have two simultaneous domicils, could not nullify the consequences of having in fact acquired a German domicil.¹

It is a commonplace that to constitute domicil a residence must be voluntary—a matter of free choice. In several cases, the circumstances may raise a doubt whether such freedom exists. Residence must be voluntary ✓

A clear example of constraint preclusive of this freedom is imprisonment in a foreign country, and there is no doubt that a prisoner, except perhaps one transported for life, retains the domicil that he possessed before his confinement.² (i) Prisoners ✓

It cannot be predicated that refugees, such as the *émigrés* who fled from France after the revolution or from Hitler's Germany, necessarily retain their former domicil. The motive that induced the flight no doubt militates against the inference that there was an intention of permanent residence in the chosen asylum. There is a presumption against a change of domicil, but 'what is dictated by necessity in the first instance may afterwards become a matter of choice',³ and the presumption may well be reversed by subsequent circumstances, as, for example, by the continued retention of the residence after a return to the original country has become safe and practicable.⁴ (ii) Refugees ✓

Another example of involuntary residence in a new country is that of the fugitive from justice. Nevertheless, if a man leaves his domicil in order to escape the consequences of a crime, the natural inference is that he has left it for ever and that a presumption arises in favour of the acquisition of a fresh domicil in the country of refuge. His departure has, indeed, been forced upon him, yet it is scarcely credible that he intends it to be temporary. In one case, however, Lindley L.J. suggested that the 'all-important' factor is whether there is a definite period after which a wrongdoer may return home in safety. In other words, if the crime ceases to be punishable or the sentence to be enforceable after a given number of years, residence in another country, unless fortified by other facts, does not effect a change of domicil; but if the fugitive remains perpetually liable to proceedings, then the new place of residence (iii) Fugitives from justice ✓

¹ *Re Steer* (1858), 3 H. and N. 594. To the same effect, *Re Liddell-Grainger's Will Trusts*, [1936] 3 All E.R. 173.

² *Burton v. Fisher* (1828), Milw. 183; *Butler v. Dolben* (1756), 2 Lee 312, 318; *In re the late Emperor Napoleon Bonaparte* (1853), 2 Rob. Eccl. 606.

³ *Winans v. A.-G.* (1904), 85 L.J. (N.S.) 508, at p. 510, per Collins M.R.

⁴ *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *May v. May*, [1943] 2 All E.R. 146.

becomes the new domicile.¹ This view was not adopted by the other members of the court, Rigby L.J. remarking that to suggest that the fugitive in question intended at the time of his escape from France to return as soon as he could safely do so (twenty years in the particular case) was 'so irrational that, in default of the strongest evidence, it ought not to be imputed to him'.² It is, indeed, difficult to agree with Lindley L.J. except possibly where the offence is trifling and the term of prescription short.

(iv) Fugitive debtors

✓ Freedom of choice is also affected when a man finds it desirable to flee the country to avoid his creditors. Whether this raises a presumption against an intention to return to his own country must obviously depend upon a variety of circumstances, such as the amount of the debts, the possibility of meeting them, the imminence of legal proceedings, the activities of the debtor in his new residence and so on. It certainly cannot be said that the adoption of the new residence *per se* effects a change of domicile.³

(v) Invalids

✓ The case of an invalid who settles in a foreign country for the sake of his health, not merely for the purpose of convalescence, should on principle occasion no difficulty. The principle is that unless a man is a free agent his adoption of a new residence does not effect a change of domicile. He must have an alternative—either to stay or to go. But it would seem that an alternative is open to every invalid. To take even the extreme case, if a man, being assured by his doctors that he has but a few months to live, decides to spend the short remainder of his life in a country where the climate may alleviate his suffering, it would seem clear, if all sentiment of pity is dismissed, that of his own volition he has chosen a new and permanent home, since he intends to continue his new residence until death. The *factum et animus* essential for a change of domicile are present.⁴ Yet, this suggestion has been stigmatized by Lord Kenyon as 'revolting to common sense and the common feelings of humanity'.⁵ No doubt it is, and no doubt a court would in fact declare against a change of domicile in such circumstances,

¹ *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 232.

² *Ibid.*, at p. 235.

³ For example, see *Pitt v. Pitt* (1864), 4 Macq. 627; *Briggs v. Briggs* (1880), 5 P.D. 163; *In re Robertson* (1885), 2 T.L.R. 178; *In re Wright's Trusts* (1856), 25 L.J. Ch. 621, 624.

⁴ But see Dicey, p. 122.

⁵ *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 292; see also *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42, 139, *per* Lord Campbell.

but nevertheless the decision would be difficult to reconcile with strict principle unless, perhaps, it could be buttressed by the argument that the invalid contemplated a return to his former home if the medical verdict should prove to be unfounded.

The case just put, however, is an extreme one. Where the necessity of selecting a different climate is of a less compelling nature, where there is no immediate danger,¹ the normal principle is consistently applied and the fact that the invalid's sole reason for departure is a desire to enjoy better health or to retard the progress of a disease cannot *per se* be regarded as excluding an intention to remain permanently in the chosen place. Otherwise a most artificial meaning would be attached to intention. We should be forced to hold, for example, that an Englishman who settles in France in order to escape income-tax retains his English domicile, since he will probably return if the cost of living falls. The exact point arose in Hoskins v. Matthews.²

fact: In that case a testator with an English domicile of origin went to Florence at the age of 60, and, except for three or four months in each year, lived in a villa which he had bought there until he died twelve years later. He was suffering from an injury of the spine and there is no doubt that he left England solely because he thought the warmer climate of Italy might benefit his health or might even cure him. His housekeeper deposed as follows:

'Mr. M.'s object in coming to Florence and residing there was to benefit his health; he had no other object in staying there. He frequently regretted having purchased the villa. He often said there was no country like one's own to live in. He was speaking of England when he so expressed himself. His wish was to return to England if his state of health would allow him to do so, and I think he would have done so had he been restored to health. . . . He never treated Florence as being his permanent place of residence.'

*residence
must be
voluntary*

It was contended, therefore, that since the residence in Florence was a matter of necessity, not of choice, it did not suffice to cause a change of domicile. In the result it was held³ that the English domicile had been lost. Turner L.J. said:

'In this case I find nothing in the evidence to show that Mr. Matthews, when he left England, was in any immediate danger or apprehension. He was, no doubt, out of health, and he went abroad for the purpose of trying the effect of other remedies and other climates. That he would have preferred settling in England I have little doubt,

¹ *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28.

² (1856), 8 De G. M. & G. 13.

³ Knight Bruce L.J. dissenting.

but I think he was not driven to settle in Italy by any cogent necessity. I think that in settling there *he was exercising a preference, and not acting upon a necessity*, and I cannot venture to hold that in such a case the domicile cannot be changed.'

(vi) Miscellaneous cases

There are various other cases, somewhat analogous to those just discussed, in which the reason to which a change of residence is due has a rather more decisive effect upon the question of intention. Thus, if a person resides abroad in pursuance of his duties as a public servant of his own Government, as, for example, an ambassador, a military or naval officer, a colonial judge or a consul, or if he is a servant under contract to go where sent, the inference to be drawn from the cause of the residence is that it is not intended to be permanent.¹

In such cases the existing domicile is retained unless there are additional circumstances from which a contrary intention can be collected.² Thus, to take an extreme case, it has been held that even a member of the armed forces may acquire a domicile in a foreign country where he is compulsorily resident and whence he is liable to be removed at any moment by higher authority, if there is sufficient evidence of his intention to settle there permanently as soon as he once more becomes a free agent.³ The fact that the area of his new home coincides with his area of service does not *per se* preclude him from acquiring a new domicile. It has also been held that if the requisite residence and intention are satisfactorily proved, he may acquire a domicile in a country other than that in which he is compulsorily serving.⁴

¹ *In re Patten* (1860), 6 Jur. (n.s.) 151 (naval); *A.-G. v. Rowe* (1862), 1 H. & C. 31 (Chief Justice of Ceylon); *Firebrace v. Firebrace* (1878), 4 P.D. 63 (army officer); *In re Mitchell, ex parte Cunningham* (1884), 13 Q.B.D. 418 (army officer); *In re Macreight. Paxton v. Macreight* (1885), 30 Ch.D. 165 (Jerseymen serving in British Army); *A.-G. v. Kent* (1862), 31 L.J. Ex. 391, 397 (attaché to Portuguese Embassy); *Sharpe v. Crispin* (1869), L.R. 1 P. & D. 611 (consul). In the South African case of *Baker v. Baker*, [1945] A.D. 708, approval was expressed of the view taken by the Court of Session in *Sellars v. Sellars*, [1942] S.C. 206, that a sailor or soldier is not precluded from acquiring a new domicile in a foreign country where he is serving, and from which he is liable to be moved under orders.

² *In the goods of James Smith* (1850), 2 Rob. Eccl. 332.

³ *Donaldson v. Donaldson*, [1949] P. 363. *Cruickshanks v. Cruickshanks*, [1957] 1 W.L.R. 564. So held also in Scotland, *Sellars v. Sellars*, [1942] S.C. 206; and in South Africa, *Baker v. Baker*, [1945] A.D. 708; *Nicol v. Nicol*, [1948] 2 S.A.L.R. 613; *Ex parte Glass*, [1948] 4 S.A.L.R. 379; *Naville v. Naville*, [1957] (1) S.A. 280 (consul), see 6 I. & C.L.Q., 556.

⁴ *Stone v. Stone*, [1958] 1 W.L.R. 1287.

It would seem that a person who enters the armed forces of a foreign power, in such circumstances as to necessitate his indefinite residence in the foreign country, acquires a new domicile there.¹

The burden of proof that lies upon those who allege a change of domicile varies with the circumstances. In this connexion there are two observations that may be made.

First, English judges have taken the view that it requires far stronger evidence to establish the abandonment of a domicile of origin in favour of a fresh domicile than to establish a change from one domicile of choice to another.²

Secondly, and by way of contrast, there is authority for the view that a change of domicile from one country to another under the same sovereign, as from Jersey or Scotland to England, is more easily proved than a change to a foreign country.³ It is not lightly to be inferred that a man intends to settle permanently in a country where he will possess the status of an alien, with all the difficulties and conflict of duties that such a status involves.

It is important to appreciate, however, that nationality and domicile are two different conceptions and that a man may change the latter without divesting himself of his nationality.⁴ There is no rule that he must intend *quatenus in illo exuere patriam*, despite a short flirtation with the suggestion by certain of the earlier judges.⁵

‘A change of domicile is not a condition of naturalization, and naturalization does not necessarily involve a change of domicile.’⁶

An Englishman may remain an Englishman in the sense that his allegiance renders him subject to certain duties to the Crown, and yet he may so change his residence that many of

¹ *In re Mitchell, ex parte Cunningham* (1884), 13 Q.B.D. 418, 421, as qualified by the earlier remarks of Page Wood V.C. in *Forbes v. Forbes* (1854), Kay 341, 356.

² *Infra*, p. 186.

³ *Whicker v. Hume* (1858), 7 H.L.C. 124, 159, *per* Lord Cranworth; approved by Lord Chelmsford, *Moorhouse v. Lord* (1863), 10 H.L.C. 272, 287.

⁴ *Boldrini v. Boldrini*, [1932] P. 9, 15; *Bradfield v. Swanton*, (1931) Ir.R. 446. For the converse case of a change of nationality without a change of domicile, *Wahl v. A.-G.* (1932), 147 L.T. 382.

⁵ Pollock C.B. in *A.-G. v. Wahlstatt* (1864), 3 H. & C. 374, 387; Lords Cranworth and Kingsdown in *Moorhouse v. Lord* (1863), 10 H.L.C. 272. See the discussion by Westlake, *Private International Law* (4th ed.), pp. 328–35.

⁶ *Wahl v. A.-G.* (1932), 147 L.T. 382, *per* Lord Atkin.

his legal rights and obligations will be determinable by a foreign system of law, as being the law of his domicile.¹ The mere fact that an alien living in England under a certificate of registration is liable to deportation for misbehaviour or has even been recommended for deportation does not prevent him from acquiring an English domicile of choice,² or deprive him of a domicile already acquired.³ Neither the permissive nor the precarious character of his residence nullifies his intention to settle in England.⁴

④ *Domicil of origin and domicil of choice contrasted.*

Abnormal
features of
domicil of
origin

As compared with the views held on the Continent and in the United States of America, the domicil of origin is regarded by English law as fundamentally different from a domicil of choice. It differs in its character, in the conditions necessary for its abandonment and in its capacity for revival.

Its tenacity

(i) In the first place, there is the strongest possible presumption in favour of its continuance. As contrasted with a domicile of choice, it has been said by Lord Macnaghten that 'its character is more enduring, its hold stronger and less easily shaken off'.⁵ In fact, decisions such as *Winans v. A.-G.*⁶ and *Ramsay v. Liverpool Royal Infirmary*⁷ warrant the conclusion that almost overwhelming evidence is required to shake it off. In the latter of these cases evidence was completely lacking of the slightest indication, either by words or actions, that George Bowie intended to live anywhere else than in England. Yet it was held that the tenacity of his Scottish domicile of origin had not yielded. These cases do not stand alone.⁸

Domicil of
choice lost
by removal
*animo non
revertendi*

(ii) The second difference relates to the abandonment of an existing domicile. Since a domicile of choice is voluntarily acquired *animo et facto*, so it is extinguishable in the same manner, i.e. merely by a removal from the country *animo non revertendi* and even without acquiring a fresh domicile.⁹ The

¹ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 452.

² *Boldrini v. Boldrini*, [1932] P. 9; *May v. May* (1943), 169 L.T. 42; *Zanelli v. Zanelli* (1948), 64 T.L.R. 556.

³ *Cruh v. Cruh*, [1945] 1 All E.R. 545.

⁴ *Zanelli v. Zanelli*, *supra*, per Lord du Parcq.

⁵ *Winans v. A.-G.*, [1904] A.C. 287, 290.

⁶ *Supra*, p. 167.

⁷ [1930] A.C. 588; *supra*, p. 169.

⁸ See, for example, Bentwich, *Le Développement récent du domicile en droit anglais* (Extrait du *Recueil des Cours*, 1934), pp. 13 et seq., who cites *Fowler v. Fowler*, *The Times* newspaper, 21 Nov. 1930; *Wahl v. A.-G.*, (1932), 147 L.T. 382; *A.-G. v. Yule* (1931), 145 L.T. 9.

⁹ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 450.

only distinction between acquisition and abandonment is that the latter requires less evidence than the former.¹

But the domicil of origin, which in its inception is not a matter of free will but is communicated to a person by operation of law, is not extinguished by mere removal *animo non revertendi*. It cannot be lost by mere abandonment. It endures until supplanted by a fresh domicil of choice. Bell v. Kennedy² is the leading authority for this rule. Domicil of origin not lost by removal *animo non revertendi*
1868

Fact:- The domicil of origin of Bell was in Jamaica, where he had been born of Scottish parents domiciled in that island. He was educated in Scotland but returned to Jamaica after reaching his majority. Some fourteen years later he left the island without any intention of returning, resided with his mother-in-law in Scotland, and occupied himself in looking for an estate in that country on which to settle down. He had not been successful in this when his wife died in 1838, but after her death he bought an estate and it was admitted that at the time of the trial he had acquired a Scottish domicil. The question for decision, however, was—what was his domicil at the time of his wife's death?

It was held that his domicil at that moment was in Jamaica. Although he had abandoned the island for good in 1838 and was resident in Scotland, he had not at that time decided to make his permanent residence there. The evidence showed that in 1838 his mind was vacillating with regard to his future home. Therefore, since he had not acquired a Scottish domicil of choice, he retained his domicil of origin.

(iii). The third difference, which is the complement of the second, lies in the doctrine of revival. If the domicil of origin is displaced as a result of the acquisition of a domicil of choice, the rule of English law is that it is merely placed in abeyance for the time being. It remains in the background ever ready to revive and to fasten upon the *propositus* immediately he abandons his domicil of choice.³ The position may be illustrated by an example, based on the hypothesis that the George Bowie, whose case was decided in Ramsay v. Liverpool Royal Infirmary,⁴ had married after his arrival in England and that a son, X, had been born to him. In these circumstances X's domicil of origin would have been Scottish, since at his birth his father was domiciled in Scotland. Let us now suppose the following:

At the age of 22, X, who has developed a strong dislike for the United Kingdom, leaves the country determined never to set foot in

¹ *In re Lloyd Evans*, [1947] 1 Ch. 695. ² (1868) L.R. 1 Sc. & Div. 307.

³ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441. ⁴ *Supra*, p. 169.

the British Isles again. He acquires a domicile of choice in Peru. After residing there for forty years, in the course of which he has amassed a fortune, he leaves the country for good and takes up his temporary residence in New York, being undecided whether to settle permanently in Virginia or California.

The result is that immediately upon his departure from Peru his Peruvian domicile ceases abruptly, but his Scots domicile of origin revives and remains attached to him until he has in fact acquired a domicile of choice in some other country. It is clear, of course, that during his period of indecision in New York there must be some personal law applicable to him. This might be either Peruvian or Scottish law. In the United States of America, where the doctrine of revival is not accepted, it would be the law of Peru. According to Lord Chancellor Hatherley, however, to admit this is to be driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely forsaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere.¹ He then asks:

‘Why should not the domicile of origin cast upon him by no choice of his own, and changed for a time, be the State to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice?’

Eccentric
results of
doctrine of
revival

Yet certain doubts suggest themselves. Is it so absurd to prefer the law under which the man has recently been living, perhaps for a prolonged period? Are the claims of the law which is imposed upon him at birth, independently of his volition, superior to that which he has voluntarily chosen and long retained? And what if it is his domicile of origin that he has ‘resolutely shaken and cast off’? At any rate the advantages of preferring the domicile of origin in the case of our hypothetical X are not particularly conspicuous.

The country which determines his personal law is one which he has never visited and for which he feels a repugnance. Nevertheless, if he desires a divorce, he must resort to Scotland. If, during his residence in New York, he legitimates a child by a method recognized in Peru or New York but not in Scotland, he will have achieved nothing. If he dies intestate leaving movables in England, they will be distributed according to Scots law and United Kingdom death duties will be payable.

¹ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. at p. 450.

These illustrations, which could be multiplied, provoke the thought that the virtues of the doctrine of revival are not so obvious as appeared to the mid-Victorian judges.

There can be no doubt, then, that the English conception of the domicile of origin is exceptional and widely different from that current on the Continent and in the United States of America. It has been said that it represents 'the coherence of the English family in the upper strata of society and of the lasting sentimental and frequently material connexion of the family members to their common place of origin'.¹ This may be true, since the doctrine became firmly established in the middle of the nineteenth century when England was a nation of enterprising pioneers, most of whom regarded their ultimate return home as a foregone conclusion. But, whether true or not, it is evident that the English doctrine is more akin to nationality than to domicile in the Continental sense.² In fact it transcends even nationality in stability and permanence, for though it may be placed in abeyance it can never be destroyed. To the end of his life a man's domicile of origin retains its capacity for revival. On the other hand, nationality is easily destructible.³

Domicil of
origin more
stable even
than
nationality

(5) *Domicil of dependent persons.*

There are three classes of dependent persons—infants, married women and persons mentally disordered.

A child acquires at birth a domicile of origin by operation of law, namely, if legitimate and born in his father's lifetime, the domicile of his father;⁴ if illegitimate⁵ or born after his father's death,⁶ the domicile of his mother. A foundling is domiciled in the country where he is found.⁷ If a child is born illegitimate, but is later legitimated, his father's domicile will be communicated to him from the date of legitimation, but it is probable that his domicile of origin remains that of his mother,

Infant's
domicil of
origin

¹ Nussbaum, *Principles of Private International Law*, p. 135.

² Rabel, *The Conflict of Laws*, i. 110.

³ Bentwich, *Le Développement récent du principe du domicile en droit anglais* (Extrait du *Recueil des Cours*, 1945), p. 9.

⁴ *Forbes v. Forbes* (1854), Kay 341, 353; *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457.

⁵ *Udny v. Udny*, *supra*; *In re Wright's Trusts* (1856), 2 K. & J. 595; *Urquhart v. Butterfield* (1887), 37 Ch.D. 357.

⁶ There appears to be no English authority for this.

⁷ Westlake, s. 248; Wharton (3rd ed.), s. 39; Savigny, Guthrie's translation, pp. 37-38.

presuming that at his birth his parents were domiciled in different countries.¹

Domicil of
infant can-
not be
changed by
his own act

Before reaching full age an infant is utterly incapable of acquiring by his own act an independent domicil of choice.² He is powerless to alter his civil status. If, for instance, an Englishman marries at nineteen, sails with his wife for Australia, buys a farm and acts generally in such a way as to show an undoubted intention to reside there permanently, he none the less retains his English domicil until he attains his majority. Such a rule is completely out of touch with the realities of life, especially when the age of majority is as high as twenty-one, but one comforting thought is that though the rule is a commonplace of judicial dicta there is no English case in which the capacity of a male infant to acquire a fresh domicil has called for a decision. It is admitted, of course, that the domicil of a female infant becomes that of her husband upon her marriage to a domiciled foreigner, for otherwise there would be no common matrimonial law. In Scotland and in the U.S.A.³ it is held that the marriage of a male infant carries with it the power of acquiring a domicil of choice, on the ground presumably that his rights and obligations as a husband prevail over those formerly applicable to him *qua* son.⁴

Effect of
change in
parent's
domicil

The position is, then, that the domicil of origin remains constant throughout life and that an infant is unable to acquire a domicil of choice by his own act. This inability, however, is confined to him, and there is nothing to prevent the acquisition of a domicil of choice *for* him by the act of one of his parents. This may be effected by the father or after his death by the mother.

Domicil of
infant
necessarily
follows
that of
father

The primary rule is that the domicil of an infant automatically changes with any change that occurs in the domicil of the father.⁵ As between a living father and his infant child there is a necessary unity of domicil, even though they may reside in different countries. This unity is not destructible at the will of the father. It is not terminated if he purports to create a separate domicil for his son, for instance, by entrusting his future care and maintenance to a relative domiciled in another country or

¹ Dicey, p. 94; Wolff, p. 118.

² *Forbes v. Forbes* (1854), Kay 341, 353.

³ Beale, p. 214; Goodrich, p. 87.

⁴ For the Continent see Rabel, i. 173-4.

⁵ *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P.D. 132. As to whether a change in a guardian's domicil is communicated to his ward, see 5 *I. & C.L.Q.* 196 et seqq.

by setting him up in business abroad.¹ This doctrine, that a change in the father's domicile is necessarily communicated to the child, is generally laid down in absolute terms, but it is to be hoped that should the occasion arise it will not be pressed to its logical conclusion.

Suppose, for instance, that a father deserts his son, leaves him in his domicile of origin and himself acquires a fresh domicile elsewhere. Or suppose that he is divorced for adultery and the custody of the children is given to his wife.

In such cases as these it is scarcely credible that a court would affirm the inevitability of a common domicile.²

The domicile that an infant acquires by reason of his father's removal to another country is a domicile of choice, or better perhaps of quasi-choice,³ and his domicile of origin continues to be that imposed upon him at birth.⁴ This rule may become important at a later stage in his life. For instance:

Domicil
of origin
unaffected
by father's
change of
domicil

A father, domiciled in England at the time of his son's birth, acquires a domicile of choice in France and retains it until after his son comes of age. At the age of twenty-five, the son acquires a domicile of choice in Italy, but later abandons that country for good and dies without having acquired another permanent home.

In these circumstances, English law will revive upon the loss of his Italian law and will govern testamentary or intestate succession to his movables.

An infant acquires, upon the death of his father, the domicile of his mother.⁵ The question that has arisen here is whether such an infant's domicile continues to follow that of the mother, or whether there are any circumstances in which it will remain unaffected by her act. The general doctrine, which would appear to be strengthened by the Guardianship of Infants Act, 1925, is that if after the death of the father the infant continues to live with the mother, then any new domicile acquired by the mother is *prima facie* to be regarded as communicated to the infant.⁶ But this is not necessarily so. It is recognized that the mother is empowered to change her children's domicile either

Effect of
father's
death
during
minority of
child

¹ Wolff, p. 117; Goodrich, p. 84.

² In the U.S.A. the domicile of an abandoned child does not follow that of the deserting parent, Goodrich, p. 85; and the domicile of the mother is communicated to the infant children if their custody is given to her, Beale, i. 215; Wolff, p. 117.

³ *Harrison v. Harrison*, [1953] 865, suggested by counsel at p. 866.

⁴ *Ibid.*

⁵ *Pottinger v. Wightman* (1817), 3 Mer. 67.

⁶ *Johnstone v. Beattie* (1843), 10 Cl. and F. 42, 138.

by taking them to a new domicile acquired by her, or by leaving them where their father was domiciled at the time of his death¹ or even, it would seem, by placing them in another country under the care of a competent person. But this power must be exercised *bona fide* and with the sole object of promoting the welfare of the children. Thus, even the *prima facie* rule, that a new domicile acquired by the mother is communicated to her infant children, is displaced if this is disadvantageous to them or if the change of domicile is due to some fraudulent design on her part, as, for example, where her motive is to take advantage of a law of succession more beneficial to herself.²

Wife takes
and retains
during
marriage
domicil of
husband

The domicile of a husband is communicated to his wife immediately upon the solemnization of the marriage and, according to English law, it is necessarily and inevitably retained by her for the duration of the coverture.³ Upon the death of her husband she continues to retain it until she leaves the country *animo non revertendi* and either reverts to her domicile of origin or acquires a domicile of choice.⁴ If she sets up a separate home in another country with the intention of remaining there permanently, she retains her husband's domicile during the subsistence of the marriage, but if she continues to reside in this separate home after her husband's death she acquires a domicile of choice there without any further expression of intention being necessary.⁵ She possesses no capacity whatsoever during the marriage of acquiring a separate domicile of her own, not even if she is judicially separated,⁶ or if her husband has deserted her and established a home with another woman in a different country,⁷ or if he has committed acts which afford ground for divorce.⁸ This incapacity, which has disappeared in the United States of America and in several Continental States, represents the last surviving relic in English law of the married woman's subjection to her husband.

The marriage must
be valid
or voidable

The prerequisite of the unity of domicile is marriage. A marriage may be valid, voidable or void. A voidable marriage is

¹ *In re Beaumont*, [1893] 3 Ch. 490.

² *Pottinger v. Wightman* (1817), 3 Mer. 67, 79-80.

³ *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574.

⁴ *Re Wallach*, [1950] 1 All E.R. 199.

⁵ *In re Scullard*, [1957] Ch. 329. For a commentary on this decision, see 33 *B.Y.B.I.L.* 329-32.

⁶ *A.-G. for Alberta v. Cook*, [1926] A.C. 444 (P.C.).

⁷ *H. v. H.*, [1928] P. 206; *Herd v. Herd*, [1936] P. 205.

⁸ *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146.

one which may be judicially annulled at the instance of either party on some ground, such as impotence, recognized by law. Until annulment, however, it is regarded as a subsisting valid marriage. On the other hand, a marriage which is void by reason *inter alia* of the near relationship of the parties or their failure to observe the legal formalities at the ceremony requires no decree of annulment. It is regarded as never having existed.¹ One result of this distinction is that, if a woman goes through a ceremony of marriage with a man domiciled in a different country, she automatically acquires his domicile if the marriage is valid or voidable, but not if it is void.²

Although there is no direct authority, it is generally argued ^{Lunatics} that the domicil of a lunatic cannot be changed either by himself, since he is incapable of forming an intention, or by the person to whose care he has been entrusted.³ Of course, in accordance with the general principle applicable to infants, the domicil of the father will be communicated to a child of unsound mind during the minority of the latter, but a somewhat irrational distinction has been suggested as regards an adult lunatic. If he has been continuously insane both during and after infancy, it is said that his domicile will continue to change with that of his father; but that if he first becomes insane after reaching his majority, his then domicile becomes indelible, for if the power of changing it were vested in the father great danger might be done to 'the interests of others'.⁴ The correct solution, though not yet supported by authority in England, seems clear enough. The paramount consideration is the interest of the lunatic, not of others. Therefore, it would be advisable that the Court of Protection should be entitled to change his domicile if this appears to be for his benefit. iii)

It has been suggested that the capacity of a dependent person to acquire a fresh domicile is not always governed by English law. Such a possibility was adumbrated *obiter* in an English case in 1887,⁵ but more recently it has been canvassed by Professor Graveson.⁶ ^{Capacity to acquire domicile not a matter of choice of law} It is respectfully submitted, however, that this thesis is based upon a fundamental misconception,

¹ For void and voidable marriages see *infra*, pp. 353 et seqq.

² *De Reneville v. De Reneville*, [1948] P. 100.

³ *Urquhart v. Butterfield* (1887), 37 Ch.D. 357, 382; *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198; *Sharpe v. Crispin* (1869), L.R. 1 P. & M. 611; Dicey, p. 121; Westlake, s. 251.

⁴ *Sharpe v. Crispin* (1869), L.R. 1 P. & M. 611, 618, *per* Sir J. P. Wilde.

⁵ *Urquhart v. Butterfield* (1887), 37 Ch.D. 357, see *per* Lopes L.J., at p. 384.

⁶ 3 *I.L.Q.* 149-63.

since it overlooks the fact that domicile is no more than a connecting factor. Its acquisition is not *itself* a problem for the solution of which a rule for the choice of law is required. As we have seen, the connecting factor in any English choice of law rule must logically always be interpreted according to English notions.¹ Thus, if a husband domiciled in New York deserts his English-born wife and goes abroad with another woman, his wife cannot acquire a separate domicile in England by returning there *animo manendi*. She may have acquired an English domicile in the sense in which the word 'domicil' is used in the New York courts, but an English court is concerned only with its own conception of the term. It is part of this conception that the domicile of a wife is the same as that of her husband.

⑥ *Domicil and nationality.*

Domicil
and national-
ity dis-
tinguished

Nationality is a possible alternative to domicile as the criterion of the personal law.² These are two different conceptions. Nationality represents a man's political status, by virtue of which he owes allegiance to some particular country; domicil indicates his civil status and it provides the law by which his personal rights and obligations are determined.³ Nationality depends, apart from naturalization, on the place of birth or on parentage; domicil, as we have seen, is constituted by residence in a particular country *animo manendi*. It follows that a man may be a national of one country but domiciled in another.

The history of the parts played by these two concepts in the present context is shortly as follows.

Domicil
prevailed
after fall
of Roman
Empire

As we have already seen, the problem of a conflict of laws in its modern form did not arise until the emergence of the medieval city States in Italy. The growth of inter-city commerce compelled the post-glossators to establish the identity of the personal law, and they had no hesitation in affirming that its criterion was domicile. For over five hundred years this principle had no rival. Nationality was not considered as a possible alternative. One reason was that for several centuries the problem of the choice of law did not usually arise between the subjects of different countries, but between the inhabitants

¹ *Supra*, p. 51.

² In certain countries, such as India, China, Algeria, Tunisia, Syria and Egypt, the personal law depends upon religion or race; Rabel, i. 124-5.

³ *Udny v. Udny* (1869), L.R. 1 Sc. & Div. 441, 457, *per* Lord Westbury.

of the various parts of one country. France, for instance, was organized into a number of provinces each of which to a large extent enjoyed its own individual system of law. The same came to be true of the Netherlands and Germany and ultimately of North America. In such circumstances it is obvious that, since the inhabitants of these political States all owed allegiance to the same sovereign, a question of conflict of laws arising between them could not be referred to the law of their nationality. It is not surprising, therefore, that the *lex domicilii* won universal recognition.

A decisive break with tradition, however, occurred with the promulgation of the Code Napoléon in 1803. This provided that the rules contained therein concerning status and capacity should govern Frenchmen even though residing in foreign countries,¹ and, although no provision was made for the reverse case of foreigners residing in France, the prevailing tendency in the French courts has always been to apply by way of reciprocity the national law of a foreigner to any matter concerning his status or capacity. The Austrian code followed suit in 1812 by providing that the capacity of an Austrian should be governed by Austrian law irrespective of his domicile or residence. Later the reception of nationality as the test of the personal law was greatly influenced by events in Italy. The man chiefly responsible for this was the Italian patriot Mancini. At a famous lecture delivered at the University of Turin in 1851, he vigorously emphasized the significance of nationality. Laws, he said, are made more for an ascertained population than for an ascertained territory. The one concern of a sovereign is his subjects, and in framing his legislation he considers their physical and moral qualities, their habits and requirements, indeed even the climate, temperature and fertility of the soil of the country to which they belong. Thus, for instance, French legislation provides the ideal law for a Frenchman, since it is most suited to his character, and therefore logic requires that it should continue to govern him no matter where he may go or where he may become domiciled. Exceptionally, however, the national law must be discarded if its application will conflict with the public policy of the forum. Mancini exercised great influence over legislation when Italy, by throwing off the Austrian yoke, established herself as a separate kingdom, and it was mainly due to him that the Italian code of 1866 ordained that the status, capacity and family relations of

Law of
nationality
adopted in
France,
1803, and
in Austria,
1812

Mancini's
influence
in favour
of nation-
ality

¹ Art. 3 (3).

persons should be governed by the law of the nation to which they belonged.

Wide-spread adoption of principle of nationality The truth is that the ascertainment of the personal law, which should be governed by legal and practical considerations, has been influenced by varying political and economic factors. The French revolution, the struggles of Italy to win independence, the wave of nationalism that swept Europe in the nineteenth century, the desire of the poorer countries to share in the prosperity of their emigrants—these and other similar circumstances have led to a widespread idolatry of the principle of nationality. At present many of the most important countries, such as France, Germany, Italy, Spain, Sweden, Holland, Greece, Japan and Mexico, comprising probably about 500 million people,¹ adopt nationality as the criterion of the personal law. On the other hand, the British Commonwealth, the United States of America, Norway, Denmark and Brazil, among others, still stand by the test of domicil.²

Respective merits of the two conceptions It may be asked, what are the respective merits of domicil and nationality as a determinant of the law to govern status and personal rights generally? Each has its merits and demerits.³

Merits of domicil The English preference for domicil is based on two main grounds. First, broadly speaking, domicil means the country in which a man has established his permanent home, and what can be more natural or more appropriate than to subject him to his home law? It is difficult to agree that he should be excommunicated from that law merely because technically he is a citizen of some State which he may have abandoned years ago.⁴ Secondly, domicil furnishes the only practicable test in the case of such political units as the British Commonwealth and the United States of America, where the same nationality embraces many diverse legal systems. The expression 'national law' when applied to a British citizen is meaningless. It is one system in England, another in Scotland, another in Quebec and so on.

¹ In 1909 it was estimated by Zeballos that about 500 million persons were subject to their *lex domicilii* and about 460 million to their *lex patriae*; Wolff, s. 97; Nussbaum, p. 24.

² For more detailed lists see Wolff, ss. 95–96; Rabel, i. 110–11, 113–15.

³ See 61 L.Q.R. 363 et seq., where the question is considered in relation to divorce.

⁴ Of course, if a country which adopts the principle of nationality also accepts the doctrine of *renvoi*, the practical result may be the substitution of the *lex domicilii* for the law of nationality.

In the course of its development in England, however, the law relating to domicile has acquired certain vices. A short mention of these will suffice here, as they have already been discussed in this chapter. Demerits of the English conception

First, it will not infrequently happen that the legal domicile of a man is out of touch with reality, for the exaggerated importance attributed to the domicile of origin, coupled with the technical doctrine of its revival, may well ascribe to a man a domicile in a country which by no stretch of the imagination can be called his home.¹ (i) Sometimes produces unrealistic results

Secondly, an equally irrational result may ensue from the view of the English courts that long residence is not equivalent to domicile if accompanied by the contemplation of some uncertain event the occurrence of which will cause a termination of the residence.² (ii) Insufficient effect given to long residence

Thirdly, the ascertainment of a man's domicile depends to such an extent upon proof of his intention, the most elusive of all factors, that only too often it will be impossible to identify it with certainty without recourse to the court.³ (iii) Domicile often difficult to identify

Nationality, as compared with domicile, enjoys the advantage that normally it is easily ascertainable. Nevertheless, it is objectionable as a criterion of the personal law on at least three grounds. Demerits of nationality

First, it may be a country with which the *propositus* has lost all connexion, or with which perhaps he has never been connected. It is a strange notion, for instance, that a Neapolitan, who has emigrated to California in his youth without becoming naturalized in the U.S.A., should throughout his life remain subject to Italian law with regard to such matters as divorce and testamentary capacity. (i) Nationality and home may differ

Secondly, nationality is sometimes a more fallible criterion than domicile. In the eyes of English law no man can be without a domicile, no man can have more than one domicile at the same time. On the other hand, he may be stateless or may simultaneously be a citizen of two or more countries. (ii) A man may have a multiple or no nationality

Thirdly, nationality cannot always determine the internal law to which a man is subject. This is the case, as we have seen, when one political unit such as the United States of America comprises a variety of legal systems. It is also true of the French Empire, which contains several systems of personal law, and of such countries as Czechoslovakia and Poland where (iii) Nationality no answer if one sovereignty includes several legal systems

¹ *Supra*, pp. 186 et seqq.

² *Supra*, pp. 166 et seqq.

³ *Supra*, pp. 177 et seqq.

the law varies with the provinces. In such cases, the countries that adopt the principle of nationality for matters of personal status recognize that, after nationality has fulfilled its primary function of connecting the *propositus* with a particular political unit, a further auxiliary test is required to connect him with a definite system of internal law. Thus every Czechoslovakian national, even though born and resident abroad, is attached by registration to some district in Czechoslovakia, and, so far as concerns his personal rights, it is the municipal law prevailing in this district that represents his national law. In Poland the governing law depends upon the place of domicile in Poland, and, failing this, upon the domicile of origin.

But the practical question for an English lawyer is:

What is
the national
law of
a British
subject?

When the court is directed by English private international law to decide a question concerning a British subject according to the law of his domicile, and it finds that this law refers the matter to the law of nationality, which of the many legal systems covered by the British flag is to be taken as representing the national law?

There is, in the first place, no presumption that it is the law of England rather than that of any other part of the British Commonwealth.¹ If the *propositus* is domiciled at the relevant time in a British country, the practice is to regard the *lex domicilii* as his national law. If he is domiciled in a non-British country, his domicile of origin represents his national law.² It is in a case of this nature that the principle of nationality may lead to such an eccentric decision as was given in *In re O'Keefe*.³

Conclusion

✓ Perhaps a fair conclusion, speaking very generally, is to say that, as determinants of the personal law, nationality yields a predictable but frequently an inappropriate law, domicile yields an appropriate but frequently an unpredictable law. ✓

Need for
the reform
of English
law

This division of the world into those countries that adopt the principle of nationality and those that prefer the test of domicile is unfortunate, since it obstructs the movement for the unification of rules of private international law. No effort should be spared to reconcile the opposing views. Perhaps an essential preliminary is that the English legislature should remove some of the archaic doctrines that seem incongruous in their modern environment and should frame a new definition

¹ *In re Askew*, [1930] 2 Ch. 259, note by Pollock at p. 269.

² 12 B.Y.B.I.L. 176, commenting upon *In re Ross*, [1930] 1 Ch. 377, and *In re Askew*, *supra*.

³ [1940] 1 Ch. 124, discussed *supra*, p. 71; at *In re Johnson*, [1903] 1 Ch. 826.

of 'domicil', simpler and more workable and more in accord with the Continental conception of habitual home. The justification for statutory intervention is that there is a growing tendency on the Continent to substitute domicil for nationality as the test of the personal law, but at the same time a natural reluctance to absorb the English principles *in toto*.¹

⑦ *The position of corporations.*²

A connexion with a particular country must be assigned to a corporation in order that the different rights and obligations by which it is affected may be determinable by the appropriate system of law. The subject is not free from difficulty, for the facts, such as nationality, domicil and residence, which connect the individual with a country are at first sight a little incongruous with the nature of an artificial person. Reasoning based on the analogy of a human being is apt to appear somewhat forced and strained. Nevertheless, the analogy has in general been followed by the courts, and the result of their decisions is that in the eyes of the law a corporation may be connected with a particular country by reason of any one of the following factors: Presence, Residence, Domicil, Nationality. Each of these requires separate treatment, since the country whose law governs the various matters concerning a corporation varies with the character of the question requiring a decision.

Factors connecting a corporation with a particular country

① *Presence*. The decision in 1872 that a foreign corporation is capable of being sued in England³ necessitated some principle by which to determine its amenability to the jurisdiction.⁴ It is essential to the exercise of jurisdiction that process should be served upon the defendant, and Order 9, Rule 8, of the Rules of the Supreme Court directs how this is to be done in the case of a corporation. It provides as follows:

Jurisdiction based upon service of process

In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer or on the town clerk, treasurer, or secretary of such corporation.

The Order does not in terms require that the corporation should be resident or domiciled or incorporated within the

¹ 4 *I.L.Q.* 39 et seqq.

² I acknowledge my heavy indebtedness to Farnsworth, *The Residence and Domicil of Corporations*. For other literature see 2 *Grotius Society*, 59 et seqq.; 49 *L.Q.R.* 334 et seqq.; 22 *H.L.R.* 1 et seqq.

³ *Newby v. Van Oppen* (1872), *L.R.* 7 *Q.B.* 293.

⁴ See, for a full account, Farnsworth, *op. cit.*, pp. 148 et seqq.

jurisdiction, and therefore the problem in the case of a foreign corporation has been to define the circumstances in which such service is permissible.

The principle that governs the matter in the case of an individual is that he is subject to the jurisdiction of the English court if he is present in England, or, as it is often put, if he is 'found' in England. If he is found here, he can be served here, and at common law the exercise of jurisdiction depends upon service. It is the same in the case of a corporation. Thus Lord Halsbury, in referring to a French shipping company which leased an office in London and employed an agent there to make contracts on their behalf, tersely remarked, 'They are here, and if they are here they may be served.'¹

The critical question, therefore, is—what, in the case of a foreign corporation, is the analogue of the physical presence of an individual? The answer given by English law is that the only way in which an artificial entity can show its presence is by the transaction of business, and in order to add precision to this test the courts have laid down the requirements that must be satisfied before the transaction of business by or on behalf of a corporation can justify the inference that the corporation is present in England.² The requirements are these.³

First, the business must have been done *in* England, not merely *with* England. The criterion of this is whether an agent has been employed in England with authority to enter into transactions binding upon the corporation. If his function is, for instance, to accept offers, and he does so, corporate business has been done in England; *aliter*, if his only authority is to transmit offers abroad for acceptance or rejection by his principals.⁴ Secondly, the agent must have operated at a fixed place of business for a definite period of time. Neither the impermanency of the place nor the short space of time during which business was done there is in itself sufficient to render the corporation immune from process. Thus in one case a foreign motor-car company occupied a stand at a nine days' cycle show at the Crystal Palace, where they were represented

¹ *La Bourgogne*, [1899] A.C. 431.

² *Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715, 718.

³ Farnsworth, op. cit., pp. 151, 329–32.

⁴ *Thames and Mersey Marine Insurance Co. v. Società di Navigazione a Vapore de Lloyd Austriaco* (1914), 111 L.T. 97; contrast *Saccharin Corp. Ltd. v. Chemische Fabrik von Heyden, & Co.*, [1911] 2 K.B. 516 with *Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag*, [1914] 1 K.B. 715.

by an agent with authority to make contracts on their behalf. It was held that a writ was validly served on the agent under Order 9, Rule 8.¹

In order to facilitate the service of a writ upon an 'oversea company',² the Companies Act, 1948, has placed it under an obligation to file with the registrar of companies the names and addresses of some one or more persons authorized to accept service of process on its behalf.³ So long as the name of such a person remains on the file, service of a writ upon him renders the company subject to the jurisdiction of the court. If, however, a company fails to comply with its statutory obligation, or if the persons on the register are dead or no longer resident, or if they refuse to accept service, the writ may be served on the company by leaving it at or posting it to 'any place of business established by the company in Great Britain'.⁴ These last words have been interpreted to mean a place of business which is still established at the time of service.⁵ Service is not adequate if effected at a former place of business that has ceased to function.

Oversea
companies

§ (ii) Residence. Residence, not domicile, is the basis of liability for income tax. A person resident in England, though domiciled abroad, is liable to United Kingdom income tax not only in respect of income arising from sources in England, but also in respect of his foreign income and of remuneration received from a foreign employer in so far as such income or remuneration is remitted to England.⁶ 'Person' includes a corporation. Therefore, if a company incorporated in England trades solely in a foreign country, it is essential to determine whether it is resident in England or abroad.

Income-tax
liability
depends
upon
residence

A company is regarded by the law as resident in the country where the centre of control exists, i.e. where the seat and directing power of the affairs of the company are located. The place of

Residence
depends
upon
control

¹ *Dunlop Pneumatic Co. v. Actien Gesellschaft für Motor, &c., Cudell & Co.*, [1902] 1 K.B. 342.

² Oversea companies are 'companies incorporated outside Great Britain which, after the commencement of this Act [i.e. July 1st, 1948] establish a place of business within Great Britain, and companies incorporated outside Great Britain which have before the commencement of the Act, established a place of business within Great Britain and continue to have an established place of business within Great Britain at the commencement of the Act'; Companies Act, s. 406.

³ Companies Act, 1948, s. 407 (1) (c).

⁴ *Ibid.*, s. 412.

⁵ *Deverall v. Grant Advertising Inc.*, [1955] Ch. 111. See 18 M.L.R. 180-4.

⁶ Income Tax Act, 1952, S. 132 (1). Domicil is only exceptionally relevant. Under Cases IV and V of Schedule D it affects the amount on which tax is assessable. For liability to income tax in general, see *Graveson*, op. cit., pp. 328-32.

incorporation is only one of the evidentiary facts to be considered in the course of ascertaining where the control resides. This test of control was laid down by the Exchequer Division in Cesena Sulphur Co. v. Nicholson,¹ a decision which has been repeatedly approved and followed,² and which cannot now be overruled.³

(1876)
The Cesena
Case

facts:

The Cesena company was incorporated in England under the Companies Act for the purpose of taking over and working sulphur mines at Cesena in Italy. The practical business of manufacturing and selling the sulphur was administered by an Italian delegation, including the managing director, who was permanently resident at Cesena. No products were ever sent to England, the books of account were kept in Italy, the company was registered in Italy and two-thirds of the shareholders were resident Italians. Taken by themselves, these facts went to show that the centre of business was in Italy. As against them, however, the memorandum of association set up a Board of Directors in London which controlled the 'sale, order, direction, and management' of 'the working of the company's mines, the mode of the disposal thereof, and the general business of the company'. The shareholders' meetings were held in London, and it was there that dividends were declared.

✓ In the result it was held that, since almost every act of the company connected with its management was done in London, the main place of business was in London, and that therefore the company was resident in England. By reason of this residence it was liable to pay income tax upon the whole of its profits, wherever earned.

The De
Beers Case

1906

Thirty years later any doubt that might have lingered as to whether central control was the correct test of residence was dispelled by the House of Lords in the leading case of De Beers Consolidated Mines Ltd. v. Howe.⁴ This company, unlike the Cesena company, was incorporated not in England but in South Africa, where the whole of its profits were made from the mining and disposal of diamonds. The directors met both in South Africa and in London, but the majority of them resided and met in London, and it was found as a fact that the chief control of the company's affairs resided in the hands of the London board. Thus, the profits, though arising entirely from

¹ (1876), 1 Ex. D. 428.

² San Paulo (Brazilian) Railway Co. Ltd. v. Carter, [1896] A.C. 31; Goerz v. Bell, [1904] 2 K.B. 136; De Beers Consolidated Mines v. Howe, [1906] A.C. 455; American Thread Co. v. Joyce (1913), 108 L.T. 353.

³ Egyptian Delta Land and Investment Co. v. Todd, [1929] A.C. 1, at p. 19, per Lord Sumner.

⁴ [1906] A.C. 455.

the raising and sale of diamonds in South Africa, were subject to income tax. Lord Loreburn, in a well-known passage said:

'In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can on the analogy of an individual. A company cannot eat or sleep but it can keep house and do business. We ought therefore to see where it really keeps house and does business. . . . The decision of Kelly, C.B. and Huddleston, B., in the *Calcutta Jute Mills Co. v. Mills* and *Cesena Sulphur Co. v. Nicholson* now thirty years ago, involved the principle that a company resides, for the purposes of income-tax, where its real business is carried on. These decisions have been acted on ever since. I regard that as the true rule; and the real business is carried on where the central management and control actually abide.'¹

One result of these decisions is to fix the residence of a corporation in the country where it is in fact controlled, not necessarily where, according to its constitution, it ought to be controlled.² Thus, if a subsidiary company, with its own board of directors, is registered abroad but is in fact controlled by its owners, a company resident in England, it is itself resident in England, notwithstanding that such external control may be unauthorized by its memorandum or articles of association.³

The natural inference from the above decisions is that for income-tax purposes it is impossible for a company to have simultaneous residences in two or more countries. It is difficult to disagree with Lord Atkinson when he said that, since 'the residence is where the central control and management abide, then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that the "central control and management" of a company can at the same time abide in two or more different and separated places'.⁴ Nevertheless, the matter cannot be dismissed in this summary though sensible fashion without considering two more leading cases, *Swedish Central Ry. v. Thompson*⁵ and *Egyptian Delta Land and Investment Co. v. Todd*.⁶ In each of these cases the company was an investment company, i.e. of a passive or static nature, not engaged in active trading operations, but interested solely in

Place of
control
decisive
though
contrary
to memo-
randum of
association

Company
may have
a dual
residence

¹ Ibid., at p. 458.

² *Unit Construction Co. Ltd. v. Bullock (Inspector of Taxes)*, [1960] A.C. 351.

³ Ibid.

⁴ *Swedish Central Ry. Co. v. Thompson*, [1925] A.C. 495, at p. 508; see also Atkin L.J. in the court below, [1924] 2 K.B. at p. 274.

⁵ *Supra*.

⁶ [1929] A.C. 1.

the receipt of money arising abroad. In each, the question was whether the company was liable, as being resident in England, for income tax upon such money. There were certain similarities in the facts of each case.¹ In the Swedish Case:

facts: The company was incorporated in England in 1870 with the object of constructing and running a railway in Sweden. Its registered office was in London. In 1900 it leased the railway to a traffic company for 50 years at an annual rent of £33,500 payable in England. In the same year the articles of association were altered so as to remove the control and management to Sweden, and after that time the general meetings of shareholders (most of whom were Swedish) and the meetings of the directors were held at Stockholm. Dividends were declared there and no profits were transmitted to England except in the shape of dividends due to the English shareholders. On the other hand, a committee which met regularly was established in London to deal with share transfers, to make out and attach the seal to share certificates and to sign cheques on the London banking account. The secretary resided in London and it was there that the annual accounts were made up and audited.

In the Egyptian Case:

facts: The company was incorporated in England in 1904 for the purpose of acquiring and disposing of any land served by the Egyptian Delta Rys. Ltd. Since 1907 the business had been controlled, managed and directed entirely in Cairo. The secretary-general, all the directors, the seal, share register, books and bank account were in Cairo.

In order to satisfy the requirements of the Companies Act, there was a registered office in London where the necessary lists and registers were kept. This office did not consist of a separate room. All that the company did was to employ a Mr. Horne, who carried on the business of secretary of public companies, to keep the necessary documents and to post the name of the company on the door of his office.

The Crown claimed income tax in respect of interest accruing from mortgages and leases of land made in Egypt.

Difficulty caused by the Swedish and the Egyptian Cases: It was held by the House of Lords in the Swedish Case that the company was resident both in England and in Sweden; in the Egyptian Case that the company was resident only in Egypt. ✓

These two decisions confuse rather than enlighten the law. It is clear, of course, that the business done in England was of a far more substantial character in the Swedish than in the Egyptian Case. It is also clear that the contention of the Crown in the Egyptian Case, that a company is inevitably resident in the country where it has been incorporated and where its registered

¹ For an analysis of them in parallel columns see Farnsworth, op. cit., p. 107.

office is situated, was untenable, for if this were so the decisions in the *Cesena* type of case would have been put upon that short and simple reason. Nevertheless, how is the decision in the *Swedish Case* to be reconciled with the rule established by the House of Lords, and from which no departure is possible, that a company resides where its real business is carried on and that the real business is carried on where the central control and management abide? It can scarcely be said, as Pollock M.R. said, that this is not the only test.¹ If words mean anything, there is a natural reluctance to accept the statement of Lord Cave that 'the *central* control and management of a company may be divided'.² Again, it is difficult to resist the conclusion that Lord Sumner, in explaining away the *Swedish* decision by the remark that the business done in London was little less important than that transacted in Sweden, virtually repudiated the principle of central control.

According to the suggestion of Lord Radcliffe, with whom Lord Simonds agreed, the true explanation of these two decisions is that they fall within what appears to be a clear qualification of the test of central control.³ This is that if the control is so evenly divided between two or more countries as to preclude the possibility of identifying one place of central control, then the company must be regarded as resident in each country in which to a substantial degree control is in fact exercised.

§(iii) Domicil.⁴ Questions concerning the status of a body of persons associated together for some enterprise, including the fundamental question whether it possesses the attribute of legal personality, must on principle be governed by the same law that governs the status of the individual, i.e. by the law of the domicile. What this law is admits of no doubt if we reason upon the analogy of the individual. Every person, natural and artificial, acquires at birth a domicile of origin by operation of law. In the case of the natural person it is the domicile of his father, in the case of the juristic person it is the country in which it is born, i.e. in which it is incorporated.⁵ If it is a corporation, it can be so only by virtue of the law by which it was incorporated. It is to this law alone that all questions concerning the

Probable
reconciliation
of the
cases

Domicil is
in the
country of
incorpora-
tion

¹ *Swedish Central Ry. Co. v. Thompson*, [1924] 2 K.B. at p. 265.

² *Ibid.*, [1925] A.C. at p. 501.

³ *Unit Construction Co. Ltd. v. Bullock (Inspector of Taxes)*, [1960] A.C. 351.

⁴ See generally Farnsworth, *op. cit.*, pp. 201 et seqq.

⁵ *Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80.

creation and dissolution of the corporate status are referred. In the words of Lord Wright:

'English courts have long since recognized as juristic persons, corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. . . . But if the creation depends on the act of the foreign State which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eye of English law. The will of the sovereign power which created it can also destroy it.'¹

Thus the tests of domicile and of residence are different. A company is resident where its control and management abide, it is domiciled where it is incorporated.²

Domicil is
unchange-
able

But the domicile of a corporation has this peculiarity, that it cannot be changed. It cannot be converted into a domicile of choice. 'The domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.'³

What
questions
the law of
the domicile
governs

Matters of status concerning a corporation that fall to be determined by the law of its domicile would seem to include, not only its creation and dissolution, but also all those that are regulated by its instrument of incorporation. The well-known words of Bowen L.J., spoken with reference to an English company, seem equally applicable to a foreign corporation.

'What you have to do is to find out what the statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there only, is found the definition of this new creature.'⁴

Questions concerning the status of the 'statutory creature', such as whether the individual members are personally liable,⁵ whether its transactions are *ultra vires*,⁶ or whether it may be represented in legal proceedings by its directors,⁷ are determined by the rules of its constitution as interpreted by the law of its domicile. The only gloss to make upon the statement of

¹ *Lazard Bros. v. Midland Bank Ltd.*, [1933] A.C. at p. 297.

² *A.-G. v. Jewish Colonization Association*, [1900] 2 Q.B. 556.

³ *Gasque v. Inland Revenue Commissioners*, [1940] 2 K.B. 80, at p. 84, *per* Macnaghten J., applying the statement of Sargant L.J. in *Todd v. Egyptian Land and Investment Co.*, [1928] 1 K.B. 152, 173; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535.

⁴ *Baroness Wenlock v. River Dee Co.* (1887), 36 Ch.D., note at p. 685.

⁵ *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877.

⁶ *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K.B., 49, 56-57.

⁷ *Banco de Bilbao v. Sancha*, [1938] 2 K.B. 176, 194-5.

Bowen L.J. is that in many legal systems an association of persons may be endowed with the attribute of legal personality without any express statutory incorporation or anything corresponding to it. Thus in Continental countries many unincorporated associations, including partnerships, are persons in the eye of the law. In these cases, it is to be presumed that the status ascribed to the association by the law of the country in which it has been formed will be recognized by English courts.¹

The correct role of the law of the domicile in an English action concerning a foreign corporation is well illustrated by *Metliss v. National Bank of Greece and Athens S.A.*,² where the facts were as follows:

Function
of *lex*
domicilii
illustrated
by *Metliss*
v. National
Bank of
Greece and
Athens

Facts: In 1927 the National Mortgage Bank of Greece issued sterling mortgage bonds, repayable as to principal in 1957 with interest thereon meanwhile. The bonds were guaranteed by the National Bank of Greece. It was agreed that questions arising between the bank and bondholders should be settled by arbitration in London in accordance with English law. No interest was paid after April 1941. In 1949 a Greek decree imposed a moratorium suspending all obligations and rights of action upon the bonds, and another decree in 1953 dissolved the guarantor bank and amalgamated it and the Bank of Athens (which had hitherto been unconnected with the bonds) into a new banking company under the style of the National Bank of Greece and Athens—the defendants in the instant case. This decree provided that the new bank should be the ‘universal successor’ to the rights and obligations of the former banks.

The Bank of Athens, having traded in England before its amalgamation, had acquired assets which were still in the country, and therefore the plaintiff, one of the bondholders, brought an action against the defendant bank for the recovery of arrears of interest, contending that it had succeeded to the obligations of the now defunct guarantor bank.

The first defence was that no action lay against the defendant bank, since it had not been a party to the issue of the bonds. In order to answer this, it thus became necessary to examine Greek law which alone was competent to pronounce whether the ‘statutory creature’ that it had created was an available debtor to the plaintiff. It was admitted that the English court was bound to recognize the Greek dissolution of the banks and the birth of the newly formed National Bank of Greece and Athens into which those banks had been amalgamated. The only arguable question was whether there was an equal duty

¹ *Von Hellfeld v. Rechnitzer and Mayer Frères & Co.*, [1914] 1 Ch. 748.

² *The Times Newspaper*, 13 July 1956 (before Sellers J.); [1957] 2 Q.B. 33 (C.A.); [1958] A.C. 509 (H.C.) For a discussion, see 34 *B.Y.B.I.L.* 406–8.

to recognize that the obligation undertaken by one of the defunct corporations to guarantee payment of interest on the bonds had passed to the new bank under the doctrine of universal succession. The answer is scarcely in doubt. It is wholly irrelevant that English internal law subscribes to no general doctrine by which the personality of a former entity is assumed by a successor. What is decisive is that according to English private international law the sphere of influence of the *lex domicilii* in the present context is to determine the status of artificial entities originating in the domicil. In the instant case the new entity, the defendant bank, had succeeded to the obligations of its predecessors as a result of the status imposed upon it by Greek law, and it is difficult to find any rational ground upon which the English court could admit its status as a justiciable person, but deny its liability for an obligation attached to that status. This would be to accept one facet of the governing law of the status but to repudiate another. As Lord Tucker said:

'Why an English court should be compelled to recognize that part of the [Greek] decree which has extinguished the old bank but to refuse to give effect to matters which are of the essence of the process of amalgamation I find it difficult to understand. In my view, the fact that the liability was attached to it at birth by its creator can properly be regarded as a matter pertaining to the status of the appellant company and accordingly governed by the law of its domicil.'¹

Admitting, however, that the bank was liable to be sued for arrears of interest, there was yet another argument to be met. It was said that if Greek law was followed upon the question of universal succession it must also be followed with regard to the moratorium. But to say this was to distort the correct role of the *lex domicilii*. Its function was to determine whether the defendant bank was a competent debtor, but, having settled this primary question of status, it was not entitled to determine what constituted liability in the case of an obligation subject exclusively to internal English law. As Denning L.J. tersely put it:

'When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt.'²

A later Greek attempt to extricate the defendant bank from its difficulty was unsuccessful.

*Adams v.
National
Bank of
Greece and
Athens*

¹ [1958] A.C. 509, at p. 529.

² *Metliss v. National Bank of Greece and Athens*, [1957] 2 Q.B. 33 at p. 46.

A further decree, issued by the Greek Government on 16 July 1956, after the decision of the court of first instance in the *Metliss Case*, amended the amalgamation decree of 1953 by retrospectively releasing the bank from liability under the contract of guarantee to which it had succeeded. Certain bondholders, having been refused payment of interest that fell due after 16 July 1956, sued the bank in London for recovery of these debts.

Was the release of 1956 effective? It had, indeed, already been decided in the *Metliss Case* that the Greek decree of 1953, by endowing the bank with the status of universal successor, had rendered it liable. The argument accepted by the Court of Appeal was that since Greek law, as the admitted arbiter of the status of the bank, possessed the power of endowment, it equally possessed the power of disendowment. It could abrogate the liabilities that it had formerly transferred.¹ The House of Lords, however, demonstrated the fallacy of this reasoning. The liability under the contract of guarantee, having been transferred to the bank in 1953, was an existing obligation at the time of the 1956 decree. Moreover, it was a liability that had arisen under a contract governed exclusively by English domestic law. In technical language, English law was the proper law of the contract² and therefore the well-established rule applied that the proper law alone determines whether the contract can be discharged, extinguished or otherwise affected.³

§(iv) Nationality. The test of the nationality of a corporation according to English law is the country of its incorporation,⁴ but according to most Continental laws the country where its centre of management exists.⁵ It is seldom, however, that its nationality will be relevant to a question of the conflict of laws.

Depends
on place of
incorpora-
tion

¹ *Adams v. National Bank of Greece and Athens*, [1960] 1 Q.B. 64: 'It seems to us that those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognize that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change. If they need to have the foundation of Greek law upon which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is'; *per curiam*, at pp. 81-82.

² *Infra*, pp. 213 et seqq.

³ *Adams v. National Bank of Greece and Athens*, [1960] 3 W.L.R. 8. As for discharge, see *infra*, p. 254.

⁴ *Fanson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, at pp. 497, 498, 501, 505, Lords Macnaghten, Davey, Brampton, Lindley: *A.-G. v. Jewish Colonization Association*, [1901] 1 K.B. 123, at p. 135, *per* Collins L.J. See the dicta collected and set out by Farnsworth, *op. cit.*, pp. 302-3; *Kuenigl v. Donnersmarck*, [1955] 1 Q.B. 515, 535-6.

⁵ Wolff, p. 308.

PART III

THE LAW OF OBLIGATIONS

CHAPTER VIII. CONTRACTS

CHAPTER IX. NEGOTIABLE INSTRUMENTS

CHAPTER X. TORTS

CHAPTER VIII

CONTRACTS¹

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A. DOCTRINE OF THE PROPER LAW

1. *The theories.*

THE 'proper law of the contract' is a convenient and succinct expression to describe the law that governs many of the matters affecting a contract. It has been defined as 'that law which the English or other court is to apply in determining the obligations under the contract'.² However ascertained, and this as we shall see has been the subject of controversy, it consists of a single legal system, but it is essential to appreciate at the outset that not all the matters affecting a contract are necessarily governed by one law. The correct inquiry is not—What law governs a contract? It is—What law governs the particular question raised in the instant proceedings? 'The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that

Meaning
of the
'proper
law'

¹ For a valuable monograph on this subject see Batiffol, *Les Conflits de Lois en Matière de Contrats*.

² *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, 240 (P.C.).

law is to be the proper law of the contract as a whole,¹ and the circumstances sometimes require different questions to be submitted to different laws. The questions, for instance, whether agreement has been reached, whether the parties possess capacity, whether the contract is formally valid or what interpretation is to be put upon a particular clause in the contract do not necessarily fall to be governed by the same law. Nevertheless, the court will not readily and without good reason split a contract in this respect,² and it can be said that in all cases there is a primary system of law, called the 'proper law', which usually governs most matters affecting the formation and substance of the obligation.

Difficulty
of ascer-
taining the
proper law

The problem of ascertaining the *lex causae* is more perplexing in the case of contracts than in almost any other topic. In most situations the decisive connecting factor upon which the ascertainment depends is reasonably clear. There is general agreement, for instance, that it is the *locus celebrationis* which indicates the law to govern the formal validity of a marriage, the situation of immovables which discloses the relevant *lex successionis*, and the country in which the propositus is domiciled that determines his personal law. But in the case of a contract there may be a multiplicity of connecting factors: the place where it is made; the place of performance; the domicile, nationality or business centre of the parties; the situation of the subject-matter; the nationality of the ship in the case of a charter-party and so on. Is there, therefore, any one determinant of the proper law?³

English
view that
intention
of parties
decisive

In the world of today several different solutions have been reached. In the United States of America a preference was formerly shown for a rigid and inflexible test, represented by the place of contracting in some of the States but by the place of performance in others, but the tendency now is to reach a solution on more general lines.⁴ Most of the countries of the European continent eschew anything in the way of a rigid test and, instead, adopt the doctrine of autonomy under which the parties are free to choose the governing law, though

¹ *In re United Railways of the Havana and Regla Warehouses*, [1960] Ch. 52, at p. 92 *per curiam*.

² *Kahler v. Midland Bank*, [1950] A.C. 24 at p. 42, *per Lord MacDermott*.

³ For a fuller discussion of this subject see 3 *I.L.Q.* 60-73 (F. A. Mann), replied to 3 *I.L.Q.* 197-207 (J. H. C. Morris); *Lectures on the Conflict of Laws and International Contracts* (Univ. of Michigan, 1951), pp. 1 et seqq. (R. H. Graveson); Cheshire, *International Contracts*, pp. 7-44.

⁴ *Second Restatement of the Conflict of Laws*, ss. 3321-32b.; 9 *I. & C.L.Q.* 531 et seqq.

divergent views obtain on the question whether their freedom is absolute or is restricted to the choice of a law with which the contract is factually connected.¹ The English doctrine is simple enough to state in terms, but not so simple to elucidate. Its origin is the fidelity of the Victorian judges to the Benthamite dogma of *laissez-faire*.² Its theme is the prerogative of intention. Judicial incantations to this effect are legion and the following two may be given as typical.

Willes J.: 'In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter.'³

Lord Wright: 'It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply.'⁴

There are few words less precise or more ambiguous than intention. Its ambiguity in the present context is apparent. Is it, for instance, used subjectively or, as the alternative offered by Willes J. seems to suggest, in a purely objective sense? Does it mean that the parties directed their minds to the matter and in fact reached an agreed conclusion? If the alternative offered by Willes J. describes the true doctrine, does it signify the common intention that the parties would have held had they considered the matter or does it merely mean the intention which as reasonable persons they ought to have formed, having regard to all the relevant factors? Clearly, without a deeper analysis it is scarcely possible to be content with the aphorism that the proper law is the law intended by the parties.

Vagueness
of the
word 'in-
tention'

Another theory is that the proper law is the law of the country in which the contract may be regarded as localized. Its localization will be indicated by the grouping of its elements as reflected in its formation and in its terms.⁵ The country in which its elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs. It may have factual links with several countries, each of which has some claim to be considered; it may also possess features, such as a distinctive legal phraseology or a provision that the price of goods sold shall be payable in the currency of

Theory of
localiza-
tion of
contract

¹ For a detailed account see Rabel, *op. cit.*, ii. 368 et seqq.

² *Lectures on the Conflict of Laws and International Contracts* (University of Michigan, 1951), pp. 6-8 (Graveson).

³ *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 120.

⁴ *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277, 289-90.

⁵ *Jones v. Metropolitan Life Insurance Co.* (1936), 286 N.Y., Supp. 4.

the place of delivery, which point to the law of one particular country. In most cases, however, an examination of these connecting ties will disclose without undue difficulty the country with which the contract is in fact most closely connected and in which lies its natural seat or centre of gravity. According to the distribution of its factual weight, the reasonable man will instinctively regard it, for instance, as an Italian contract. It was Westlake's considered opinion that this objective method of solving the problem has in practice been adopted by English judges. In the last edition of his *Private International Law*, for which he was partly responsible, published in 1913, after showing that the competition in the English courts had always been between the *lex loci contractus* and the *lex loci solutionis*, with dicta tending to favour the former, he concluded that

'the governing law is in fact selected on substantial considerations, the preference being given to the country with which the transaction has the most real connexion and not to the law of the place of contract as such.'¹

Scope of
intention
according
to the
localiza-
tion theory

The difference between this theory and the theory of intention as expressed, for instance, by Lord Wright in the words, 'the proper law of the contract is the law which the parties intended to apply',² is the difference between objectivity and subjectivity. According to Lord Wright's statement, the court purports to ascertain the actual intention of the parties; according to the localization theory, it imposes upon them the intention that in the circumstances of the case they should as reasonable men have formed. They are free to choose the connecting factors, such as the *lex loci contractus* and the *lex loci solutionis*, but having done this their intention is taken to be that the governing law shall be the law of the country in which the chosen factors show the contract to be localized. Men must be taken to intend the natural consequences of their acts, and to say that the proper law is the law intended by the parties is, according to the theory of localization, only another way of saying that they must have intended to submit to the law indicated by their own acts. In other words, their intention is decisive but 'only in so far as it appears that the contract and the circumstances in which it was made do not negative that intention'.³ On this view, of course, the express selection of a govern-

¹ 5th ed., S. 212. See the remarks of Kekewich J. in *South African Breweries v. King*, [1899] 2 Ch. 173, 182.

² *Supra*, p. 215.

³ Gutteridge, *Cambridge Law Journal* (1936), p. 19.

ing law will not be permissible if it conflicts with the natural seat of the contract as disclosed by the grouping of its elements.

2. *The modern law.*

The modern law depends upon whether the parties have expressly chosen the proper law or not. Ambigui
of word
'intention'

(a) *Where there is no express choice of the proper law.* Although the rule here, as laid down in a multitude of cases, is that the intention of the parties prevails, the difficulty is to discover the exact sense that intention is supposed to bear in this context. Its analysis by the judges in their numerous affirmations of the principle has not been uniform. Some emphasize the presumed intention of the parties and declare that the task of the court is to infer from the terms and circumstances of the contract what their common intention *would have been* had they considered the matter at the time when the contract was made.¹ Others say that the court must determine for the parties what they *ought to have* intended had they considered the matter.

There is a clear difference between these two views upon the function of intention. According to the first, the court in effect reads an implied term into the contract which purports to represent the common intention of the parties; according to the second, it conjectures no probabilities, but ruthlessly applies the external standard of the reasonable man. The difference, though it may seem trifling, is not without significance. Difference
between
presuming
an inten-
tion and
imposing
an inten-
tion

In the first place, it is a complete myth to regard the ultimate decision by the judge as a fulfilment of the common intention of the parties. For the judge to persuade himself that such is his aim is, as Birkett L.J. stressed in *The Assunzione*,² to live in a world of unreality. If, as invariably happens, counsel has argued with force that the plaintiff's mind was throughout directed to the law of *X* and that he would never have agreed to the law of *Y*, as suggested by his opponent, and opposing counsel has argued with equal force that the defendant would never have accepted the law of *X*, how can it be said with any approach to truth that the court, whichever way it decides the matter, will give effect to what both parties would presumably have accepted?

¹ e.g. the statement of Willes J. in *Lloyd and Guibert*, cited *supra*, p. 215. See Lord Atkin in *Rex v. International Trustee*, [1937] A.C. 500, 529: 'If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.'

² [1954] P. 150, at pp. 185-6.

Secondly, artificiality or the resort to fictions can cause little but embarrassment to a judge, and there is certainly no necessity for it in the present context. Instead of suggesting to him that he must embark upon a tortuous inquiry into the hypothetical intention of two persons now at loggerheads on the matter, it will conduce to clearer thinking if he is presented with the straightforward and intelligible problem, difficult though it may be, of deciding what intention two reasonable persons should have formed upon the identity of the proper law, having regard to all the relevant circumstances. He will at any rate be on surer ground if he is directed to impose a reasonable solution upon the parties.

Modern criterion is what ought to have been intended All doubts as to the correct approach to the matter were, however, virtually dispelled by the decision of the Court of Appeal in *The Assunzione*,¹ where, despite certain references to the criterion of the presumed intention, the more realistic and objective test of the reasonable man was clearly adopted. Thus Singleton L.J., after considering several of the leading authorities, stated the rule in the following words:

"Then the court has to determine for the parties what is the proper law which, as just and reasonable persons they ought to have intended if they had thought about the question when they made the contract. That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties, and generally all the surrounding facts."²

In other words, where it has not been expressly chosen, the proper law depends upon the localization of the contract. The court imputes to the parties an intention to stand by the legal system which, having regard to the incidence of the connecting factors and of the circumstances generally, the contract appears most properly to belong. In short, the proper law, as Westlake stressed, is the legal system with which the contract has the most substantial connexion. This principle has now been finally and unanimously endorsed by the House of Lords.³

¹ [1954] P. 150; 32 B.Y.B.I.L. 123 et seqq.

² [1954] P. at p. 175.

³ *Tomkinson v. First Pennsylvania Banking & Trust Co.*, [1960] 2 W.L.R. 969, affirming in this respect the decision of the Court of Appeal, *sub nom. In re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, at pp. 91-92. See also *Bonhoyon v. Commonwealth of Australia*, [1951] A.C. 201, 219, where Lord Simonds described the proper law as 'the system of law by reference to which the contract was made or that with which the transaction has the closest and most real connexion.'

On this view of the matter, every term of the contract, every detail affecting its formation and performance, every fact that points to its natural seat is relevant. No one fact is conclusive. It is doubtful, even, whether any useful purpose is served by the traditional practice of regarding certain facts, such as the *locus contractus*, the *locus solutionis* or, in the case of a contract of affreightment, the nationality of the flag, as presumptive evidence of the governing law. To enter upon the search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer. Moreover, where there are several circumstances pointing in different directions, 'a presumption or inference arising from one alone becomes of less importance. In such a case an inference which might be properly drawn may cancel another inference which would be drawn if it stood by itself.'¹ The contract requires to be regarded as a whole. It is submitted, indeed, that the presumptions fashioned by the Victorian judges now play but a secondary role. The proper course is not to begin with a presumption and then inquire whether there are rebutting circumstances, but to fall back on a presumption only when the circumstances, viewed as a whole, fail to reveal with reasonable certainty the law to which the contract naturally belongs.²

Little
value of
presump-
tions

The court must take into account, for instance, the following matters: the domicile and even the residence of the parties;³ the national character of a corporation and the place where its principal place of business is situated;⁴ the place where the contract is made⁵ and the place where it is to be performed;⁶ the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another;⁷ the fact that a certain stipulation is valid

Examples
of relevant
factors

¹ *The Assunzione*, [1954] P. 150, at p. 176, per Singleton L.J.

² *Ibid.*, argument of counsel, at p. 156. See, for example, *N. V. Handel Maatschappij J. Smits Import-Export v. English Exporters* (London), [1955] 2 Lloyd's Rep. 317.

³ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

⁴ *Re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

⁵ *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272; *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 82; *The St. Joseph*, [1933] P. 119.

⁶ *Norden Steam Co. v. Dempsey* (1876), 1 C.P.D. 654; *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; *In re Francke & Rasch*, [1918] 1 Ch. 470; *Hansen v. Dixon* (1906), 96 L.T. 32; *Kremezi v. Ridgway* [1949], 1 All E.R. 662.

⁷ *South African Breweries v. King*, [1899] 2 Ch. 173, 179; *The Industrie*, [1894] P. 58; *Re Hewitt's Settlement*, *Hewitt v. Hewitt*, [1915] 1 Ch. 228; *The*

under one law but void under another;¹ the matrimonial domicile in the case of a marriage settlement contract;² the nationality of the ship in maritime contracts;³ the economic connexion of the contract with some other transaction;⁴ the fact that one of the parties is a sovereign State;⁵ the nature of the subject-matter⁶ or its *situs*;⁷ the head office of an insurance company, whose activities range over many countries;⁸ and, in short, any other fact which serves to localize the contract.

The case of *The Assunzione*⁹ will sufficiently reveal the method of approach now adopted by the courts in their search for the proper law.

The Assunzione

(i) 1954:

Facts:

The preliminary question of law that fell to be decided was whether a charter-party, under which an Italian vessel had been chartered by French shippers for the carriage of grain from Dunkirk to Venice, was governed by French or by Italian law. Neither party contended that English law applied.

(i) This contract disclosed the following points of contact with French law:

The charter-party was headed 'Paris, 7th October 1949', and was therefore presumably concluded in France.

The charter-party itself was written in English, but it was followed by a supplement written in the French language.

The bills of lading were written in French and in the French standard form.

The charterers were French brokers and were acting on behalf of the French Government, though this last fact was not known to the shipowners.

(ii) On the other hand, there were the following points of contact with Italian law:

Patria (1871), L.R. 3 A. & E. 436; *Royal Exchange Assurance Corp. v. Sjörsforskrings Aktiebolaget Vega*, [1901] 2 K.B. 567; aff. [1902] 2 K.B. 384.

¹ *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 272, 291-2; *Maritime Insurance Co. Ltd. v. Assekuranz-Union von 1865* (1935), 52 LL. L.Rep. 16.

² *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

³ *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115; *The Karnak* (1869), L.R. 2 P.C. 505; *The Gaetano and Maria* (1882), 7 P.D. 1; 137.

⁴ *Rex v. International Trustee*, [1937] A.C. 500, 554, 558.

⁵ *Ibid.*, at pp. 531, 557.

⁶ *British South African Co. v. De Beers Consolidated Mines*, [1910] 1 Ch. 354, 383.

⁷ *Spurrier v. La Cloche*, [1902] A.C. 446.

⁸ *Pick v. Manufacturers Life Insurance Co.*, [1958] 2 Lloyd's Rep. 93.

⁹ [1954] P. 150. See this case discussed in 3 *I. & C.L.Q.* 356-9; 17 *M.L.R.* 255-9.

The ship flew the Italian flag and was owned by two Italian brothers carrying on business at Genoa and Naples.

Italy was the place of performance in the sense that delivery was due at Venice.

Freight and demurrage were payable at Naples in Italian currency.

The bills of lading had been endorsed to the consignees in Italy.

Thus sufficient ammunition was available to each party. The French and Italian elements were almost equally poised. The charterers, for their part, invoking the well-worn presumption in favour of the *lex loci contractus*, based their main argument upon the French place of the contract. This, however, made little impression on the court. Not only was it a single incident among many, but to argue that the contract had been concluded in the true sense in France was to ignore the fact that all the material terms of the bargain had been negotiated in letters and telegrams passing between Genoa and Paris, so that the contract was virtually complete before the formal charter-party was sent to the charterers. The heading 'Paris' was almost an accidental circumstance.¹ On the other hand, the court was equally unimpressed by the argument of the shipowners that the nationality of the ship was decisive in favour of Italian law, for again it was only one out of several significant elements.

Since, therefore, there was no outstanding fact of decisive significance, it was necessary to weigh in the balance all the relevant points of contact and thus identify the country to which the contract properly belonged. According to the external standard of the reasonable man, ought it to be regarded as Italian or French in character? The judgments in both courts were unanimous in favour of Italian law, and there is no doubt that in the opinion of the Court of Appeal the crucial fact was the obligation of the charterers to pay freight and demurrage at Naples in Italian currency. It was this which tipped the scales in favour of Italian law.

(b) *Where there is an express choice of the proper law.* It has been recognized since at least 1796 that at the time of making the contract the parties may expressly select the law by which it is to be governed.² They may declare their common intention either by a simple statement that the contract shall be governed by the law of country X, or by a provision that any question arising between them shall be settled by a judge or an

Effect of
choice of
proper law
by parties

¹ Ibid., at p. 181, *per* Birkett L.J.

² *Gienar v. Meyer* (1796), 2 H.Bl. 603, cited by Graupner in 59 *L.Q.R.* 228.

arbitrator in that country. This latter method is a common feature of international commerce.¹ Thus merchants in the grain trade between America and Europe normally use the standard form of contract issued by the London Corn Trade Association which provides for arbitration in England according to English law.² Similar forms issued by the London Rubber Trade Association, the London Rice Brokers Association, the London Cattle Food Association, and the London Copra Association are also in constant use.³ Such an arbitration clause may merely refer possible disputes to the tribunals of the chosen country or may go further and add that the tribunal shall apply the law of its own country. This addition, though convenient as a clear identification of the proper law, is not of vital significance, since for better or for worse English law is committed to the view that *qui elegit judicem elegit jus*.⁴ An express choice of a tribunal is an implied choice of the proper law.

An express
choice of a
tribunal is
not absolutely
binding

As distinct from the express or implied choice of the proper law, however, the express choice of a foreign tribunal is not absolutely binding. In accordance with the excellent principle that a contractual undertaking should be honoured, there is, indeed, a *prima facie* rule that an action brought in England in defiance of an agreement to submit to arbitration abroad will be stayed;⁵ but nevertheless the court has a discretion in the matter, and where the parties are amenable to the jurisdiction, as, for example, where the defendant is present in England, it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country.⁶

May the
parties
choose any
law?

The one question to be discussed is whether the freedom of contracting parties to select the proper law is completely unfettered. To be more precise—may they choose any law in the world however alien it may be to the factual character of the contract? Or, must their choice be restricted to the law

¹ Rabel, vol. 2, p. 377.

² *Ibid.*, p. 378.

³ The same practice obtains on the Continent and in the U.S.A.; Batiffol, *Les Conflits de Lois en Matière de Contrats*, pp. 54, 133-6.

⁴ *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.* (1927), A.C. 604; *Hamlyn & Co. v. Talisker Distillery* (1894), A.C. 202, at p. 213.

⁵ *The Gap Blanco*, [1913] p. 130; *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd.*, [1903] 1 K.B. 249.

⁶ *The Athenee* (1922), 11 LL.L.R. 6; *The Fehmarn*, [1958] 1 W.L.R. 159. This latter case, as to which see 7 *I. & C.L.Q.* 599 (P. R. H. Webb), surely goes to the verge of the law. Unless the discretion of the court in favour of allowing the English action to continue is exercised sparingly, there is a danger that foreign merchants will lose faith in the efficiency of arbitration clauses.

of some country with which the contract is already factually connected? Could the parties in *The Assunzione*,¹ for instance, have effectively agreed that the formal and substantial validity of the contract should be governed by the law of Peru?

Judged by the standard of convenience, it may be said that for the parties to have this unrestricted freedom is all to the good, since it produces certainty where otherwise everything might be uncertain. It puts the proper law beyond a peradventure and thus saves the cost and delay of a disputed trial. Judged by the standard of common sense, however, it is not so attractive, since it may, if capriciously exercised, subject the parties to a law that is unrealistic to the point of absurdity. Nothing but embarrassment seems to be gained by allowing the parties to convert their Italian contract into a Peruvian contract by calling it one. Nevertheless, there are judicial dicta of great weight which would admit this unbounded licence.

Merits and demerits of complete freedom

Dicta favouring complete freedom

'Their intention', said Lord Atkin, 'will be ascertained by the intention expressed in the contract, if any, which will be conclusive.'²

Again, in a case where it had been objected that the express choice of English law was not permissible since the contract had no connexion in fact with England, Lord Wright said:

'But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible.'³

He later affirmed that 'connexion with English law is not as a matter of principle essential'. Moreover, the prevailing opinion in the profession and among merchants engaged in international trade is that these statements accurately represent the law. On the other hand, the latest judicial pronouncement on the matter is that the court will not necessarily regard the intention expressed by the parties 'as being the governing consideration where a system of law is chosen which has no real or substantial connexion with the contract looked upon as a whole'.⁴

On principle, there is clearly no justification for the view that the parties are free to submit every aspect of their contract

Law to govern creation of obligation not a matter of choice

¹ *Supra*, p. 220.

² *Rex v. International Trustee*, [1937] A.C. 500, 529.

³ *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. (P.C.) 277, 290.

⁴ *In re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, at p. 341, per Upjohn J.

to any law that they may see fit to choose, unless, of course, it is also the proper law according to the objective standard. A distinction must be drawn between the creation of a binding obligation and the reciprocal rights and obligations that arise once the valid obligation has been established. The preliminary question, whether the parties are contractually bound, the one to the other, must in the nature of things be governed by a law independent of their volition.¹ It must be governed by the law to which the contract naturally belongs, ascertained objectively in the light of all the circumstances. If, for instance, that law is English, a party under twenty-one years of age will not be legally bound merely because he is of full capacity by some other law expressly chosen to govern the contract. 'Allowing the parties to choose the law in this regard involves a delegation of sovereign power to private individuals.'² That autonomy has no place in the choice of a law to govern the creation of a contract has been affirmed more than once by eminent judges in the common law countries.

'Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes.'³

'Parties cannot by agreeing that their contract shall be governed by the law of a foreign country exclude the operation of a peremptory rule otherwise applicable to their transaction.'⁴

'I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined.'⁵

Position
illustrated
by gra-
tuitous
contract

Though it seems almost a truism that the law to determine whether a binding obligation has been created cannot be left to the free will of the parties, the fact is of such fundamental importance that it may not be out of place to substantiate it by a series of elementary hypotheses.

Suppose that a written agreement is made in England between two Englishmen by which *A* agrees to pay £500 a year for five years into a London bank to the credit of *B*'s account.

¹ Wharton, *Conflict of Laws*, ii. 900 (3rd ed. by Parmele); *Boissevain v. Weil*, [1949] 1 K.B. 482, at pp. 490-1.

² Lorenzen, 30 *Columbia Law Review*, 658.

³ *E. Gerli & Co. v. Cunard S.S. Co.* (1931), 48 F. (2d) 115, per Learned Hand J.

⁴ *Mynott v. Barnard* (1939), 62 Comm. L.R. (Australia) 62, at p. 80, per Latham L.J.

⁵ *Boissevain v. Weil*, [1949] 1 K.B. 482, at p. 490, per Denning L.J.

This English agreement is clearly void for want of consideration.

Next, suppose that a clause is added providing that 'this agreement shall be valid, notwithstanding the absence of consideration'.

This is nothing but a derisory attempt to avoid a rule that is essential to the creation of a binding obligation.

Alternatively, suppose the insertion of a clause which provides that 'this agreement shall be subject to Scots law'.

This attempt to save the contract by evoking the more favourable doctrine of Scots law, that a gratuitous promise is binding if the promisor clearly intends to bind himself and expresses his intention in plain terms, must obviously fail. It is an abortive attempt to exclude indirectly what cannot be excluded by its direct rejection.

Next, let the facts be altered by importing a foreign element into the original agreement. Suppose that the promisee, *B*, is a Scotsman, domiciled and resident in Scotland and that there is an express clause providing that the agreement shall be governed by Scots law.

Is it credible that an action for breach of the agreement will succeed in an English court? Regarded objectively according to the grouping of its elements, this is essentially an English contract, and it is idle to suggest that the English conditions of validity can be jettisoned by the simple device of choosing a more amenable law.¹

Suppose, however, that the facts are as stated in the last example except that the annual payment is to be made at a Scots bank in Edinburgh.

On this hypothesis, it can reasonably be said that the contract is more substantially connected with Scotland than with England and that therefore the English doctrine of consideration is irrelevant.

¹ Thus the older editions of Dicey, after stating that where the intention of the parties is expressed in words 'this expressed intention determines the proper law of the contract' (6th ed., p. 584), continues: 'Nevertheless, no one can maintain that persons who really contract under one law can, by pretending that they are contracting under another law, render valid an agreement which that [*sic*] law treats as void or voidable. If it is clear that they meant to contract with reference to one law, e.g. the law of Scotland, no declaration of intention to contract under another law, e.g. the law of England, so as to give validity to the contract, will avail them anything' (6th ed., pp. 586-7). The wording is slightly altered in the 7th ed., p. 727.

Position
in the
arbitration
cases

It is important to observe the impact upon the arbitration cases¹ of this principle which relegates any issue affecting the valid creation of a contract to the proper law as objectively ascertained. The danger here is a tendency to attribute too wide an operation to the maxim *qui elegit iudicem elegit jus*.² It must be restricted to questions other than one concerned with the existence of a valid obligation. Had the parties, for instance, in *The Assunzione*³ arranged for arbitration in England, the arbitrator, if called upon to decide whether agreement had been prevented by operative mistake, would have been bound to determine that particular matter in accordance with the law of Italy. In one case, a contract, by which Scottish merchants agreed to buy from merchants of Hong Kong certain parcels of sugar to be shipped from Java to Bombay, contained a clause that any dispute should be settled by arbitration in London. At any rate superficially the transaction had no factual connexion with England, yet the House of Lords held that by virtue of the arbitration clause the proper law was English.⁴ The dispute between the parties concerned the dates at which shipments had been made, and the decision is therefore no authority upon the identity of the law to govern questions of formation. Indeed, Lord Dunedin was careful to say: 'That does not mean that everything that would have to be decided would necessarily be decided by English law. It means that the underlying law was the law of England.'⁵

The Torni

That the valid creation of an obligation is not a matter to be referred to any law that the parties may please to select is borne out by the decision of the Court of Appeal in *The Torni*.⁶ In that case:

Fact:

Oranges were shipped at Jaffa upon an Estonian ship for carriage to Hull. The bills of lading, signed at Jaffa by the directors of a Palestinian company, each provided that: 'This bill of lading, wherever signed, is to be construed according to English law.' A Palestinian Ordinance provided that every bill of lading issued in Palestine should contain a clause subjecting it to the Hague Rules and that failing such a clause it should be deemed to be subject to them. In the instant case the clause was omitted.

¹ *Supra*, pp. 221-2.

² *Supra*, p. 222.

³ *Supra*, p. 220.

⁴ *N. V. Kwik Hoo Tong Handel Maatschappij v. James Finlay & Co.*, [1927] A.C. 604. The contract was not wholly unconnected with England, since it provided that a confirmed credit should be opened there; see counsel's statement at p. 605.

⁵ *Ibid.*, at p. 608.

⁶ [1932] P. 27; affirmed 78. Criticized by Kahn-Freund, *op. cit.*, p. 43.

It was argued that English law applied as having been expressly selected and that therefore the Hague Rules were excluded, for, though they are part of English law they affect only outward shipments from England, not an inward shipment such as this was. The argument was rejected both by Langton J. and by the Court of Appeal. Greer L.J. read the Ordinance as an imperative order imposed upon parties contracting for the shipment of goods from Palestine to incorporate the Rules by an express clause. To make a contract without the clause was to make an illegal contract.¹ The position, regarded from a slightly different angle, was that the law of Palestine, which was the proper law in the objective sense,² ordained that no contract for outward shipment should be valid unless it contained or was deemed to contain a clause adopting the Hague Rules. It was not open to the parties to avoid this peremptory rule affecting the creation of the contractual obligation by the simple device of submitting themselves to a different legal system. The reference to English law, however, was by no means otiose in other respects. Its significance was that the bill of lading was to be construed according to the law of England, *but only on the assumption that it had incorporated the Rules.*³

(iii) Unfortunately, the decision of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co.*⁴ has cast doubts on the proposition that parties are not free to submit the validity of their contract to any law of their own choosing. The facts were these:

facts: A Newfoundland statute provided that the Hague Rules should govern any contract of carriage from that country and that every bill of lading in respect of such carriage should contain an express clause making the Rules applicable. A Newfoundland shipping company, having agreed to carry goods from there to New York, signed bills that omitted the express clause. The bills expressly provided that the contract should be governed by English law. *Both the Rules and the bills themselves exempted the company from liability for the negligence of the master.* Newfoundland was admittedly the country with which the contract

¹ *Ibid.*, at p. 87.

² 'There is much to be said for the application of English law, but in my view still more to be said for the application of the law of Palestine'; *ibid.*, at p. 39, *per Langton J.*

³ *Ibid.*, at p. 84, *per Scrutton L.J.*: 'I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: "Yes, here is the bill of lading with their terms in it. Now construe it according to English law."'

⁴ [1939] A.C. 277.

The Vita
Food Case

1939.

had the most substantial connexion. There was no factual connexion with England whatsoever.¹ The cargo was damaged owing to the negligent navigation of the master, and the question was whether the company was liable.

All three courts which heard the case gave judgment for the company, but on different grounds. An unassailable ground would appear to be that the Newfoundland statute, by a provision that clearly affected the creation of the contract, compulsorily imposed the Hague Rules upon the parties, and it was therefore by virtue of these Rules that the company could justify their exemption from liability. The Privy Council, however, dissenting from *The Torni*,² preferred a different reason.

In their opinion the immunity of the company rested upon the exemption clause in the contract, not upon the Rules. It could not be rested upon the Rules, for the selection of English law to govern the contract was effective, despite the absence of any connecting factor with England, and by English law the Rules apply only to an outward shipment from England, not to a shipment from any other country.

The significant and surprising implication of this reasoning is that had the Rules imposed liability for negligence, the Privy Council would have disregarded them and in reliance on the exemption clause would have found the shipowners blameless. Another surprising implication of the reasoning is that it condones the avoidance of the Hague Rules, though these have been carefully designed to bring about uniformity in the maritime law of civilized nations. The point was made by Langton J. in *The Torni*,³ where, after showing that the Rules have been adopted both by Palestine and England, he said: 'But since in each case they apply only to outward shipments they would not, if English law were held to apply, cover a shipment such as this from Palestine. The position, therefore, would be produced in which a shipment from a country governed by the Hague Rules, made to a country also governed by the Hague Rules, would escape the Hague Rules.'

This decision of the Privy Council, sitting notionally as a Nova Scotian court, has been the subject of considerable criticism, mostly adverse,⁴ and the suggestion may be ventured

¹ Though the Board, *per* Lord Wright, suggested a connexion on the ground that 'the underwriters are likely to be English'; p. 291.

² *Supra*, p. 226.

³ [1932] P. 27, at p. 37.

⁴ 56 L.Q.R. 320; 3 I.L.Q. 197; Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 419-32; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 400 et seqq.; Cheshire, *International Contracts*, pp. 31-33.

with some confidence that the English courts will not allow it to disturb the principle that the parties are not free to choose the law by which the validity of their contract is to be determined.

A final word of caution is necessary. It is important to distinguish carefully the express selection of the proper law from the quite different process of the incorporation in the contract of certain domestic provisions of a foreign law.¹ There are two different courses open to the parties. They may, within the limits already discussed, select a given law as a whole to govern the contract or, having already created a contract that is valid according to the law to which it naturally belongs, they may incorporate therein the domestic and relevant rules of some other legal system. This incorporation may be effected either by a verbatim transcription of the relevant provisions or by a general statement that the rights and liabilities shall in certain respects be subject to the chosen law. The latter is only a shorthand method of expressing the agreed terms. Thus the parties to an English contract for the sale of goods may expressly provide that their duties with regard to performance shall be regulated by the rules contained in the Swiss code. Whether a particular term incorporated in this manner is valid and effective is, of course, a matter for the proper law to determine.

Incorporation of foreign law distinguished from choice of proper law

It is well established that this right of incorporation may be freely exercised.² Whether the foreign provisions are transcribed verbatim or adopted by a general reference to the foreign code, they become English terms of the contract and must be construed as such.³ Moreover, they remain constant in the sense that they are unaffected by any change in the relevant Swiss law occurring after the date of the contract. On the other hand, a proper law intended as a whole to govern a contract is administered as 'a living and changing body of law',⁴ and effect is given to any changes occurring in it before performance falls due.⁵

Effect of incorporation

The distinction between the incorporation of foreign provisions and the choice of the proper law explains certain judicial

Right of incorporation no authority for right to select proper law

¹ 18 B.Y.B.I.L. 100-1.

² *Ex parte Dever* (1887), 18 Q.B.D. 660; *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408; *Rowett Leakey & Co. v. Scottish Provident Institution* (1926), 42 T.L.R. 331; *Ocean Steamship Co. v. Queensland State Board*, [1941] 1 K.B. 402.

³ *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q.B. 408.

⁴ Wolff, *Private International Law*, p. 424.

⁵ *Re Chesterman's Trusts*, [1923] 2 Ch. 466, 478. *In re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, at pp. 341-2.

statements which at first sight seem to allow the parties an unrestricted right to select the governing law. In one case, for instance, Bowen L.J. said:

'It is open in all cases for parties to make such agreement as they please as to incorporating the provisions of *any* foreign law with their contracts.'¹

Statements of this nature certainly do not warrant the assumption that parties may submit their contract as a whole to the law of a country with which it has no factual connexion. They are directed to a different question.

B. PARTICULAR TOPICS

I. CAPACITY

No English
authority

What law governs capacity to make a mercantile contract is a matter of speculation so far as the English authorities are concerned. There is no clear decision and the *dicta* are not very helpful. According to Cotton L.J., it is a 'well-recognized principle of law' that the *lex domicilii* governs,² but Lord Greene suggests 'high authority' for the view that the question is determined 'not by the law of the domicile, but by the *lex loci*'.³ It is clear, at any rate, that the choice lies between the *lex domicilii*, the *lex loci contractus*, and the proper law in the objective sense.

Lex domicilii not
satisfactory

It is now generally conceded that in modern conditions of trade domicile is not a satisfactory test. It is incompatible with justice and with the trust that lies at the basis of mercantile dealings, for instance, that a person over twenty-one years of age should be able to escape liability for the price of goods sold and delivered to him in a London shop on the ground that he is still an infant by his *lex domicilii*. Even on the Continent the rule that capacity is governed by the personal law cannot be relied upon by a party who, though *incapax* by his personal

¹ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, 599.

² *Sottomayor v. De Barros* (No. 1) (1877), L.R. 3 P.D. 1, 5. Although this was a marriage case, Cotton L.J. applied his statement to *any* contract. He was severely criticized in the later *Sottomayor Case* (1879), L.R. 5 P.D. 94, 100, but in *Cooper v. Cooper* (1888), L.R. 13 A.C. 88, was supported by Lord Halsbury.

³ *Baindail v. Baindail*, [1946] P. 122, 128; to the same effect Sir Creswell Creswell in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67. In *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, 689, Scrutton L.J. said the matter was determinable either by the *lex domicilii* or by the *lex loci*: Lawrence L.J., at p. 700, declined to give a final opinion.

law, is *capax* by the *lex loci contractus*.¹ There would be less objection to the *lex domicilii* if it were understood as indicating the rule that would be applied at the domicile, not to a purely domestic case, but to one containing a foreign element. A rule imposing an incapacity is not necessarily intended to be extra-territorial in scope. The policy which it is designed to serve must be ascertained before it can be said whether it has such a wide effect.

If, for instance, a person domiciled in England and over twenty but not yet twenty-one years of age were to be sued by a Swiss plaintiff for breach of a contract made and performable in Switzerland, could he successfully plead his minority, though majority is reached in Switzerland at the age of twenty?

Linguistically, indeed, the section of the Infants Relief Act which provides that certain contracts by persons under twenty-one years of age shall be 'absolutely void' embraces contracts wherever made, but the court might well restrict the rule, and it would be reasonable for it to do so, to contracts governed in other respects by English law.² So far, however, English courts have not been pressed to adopt this attitude.

It has frequently been advocated that the *lex loci contractus* governs the question of capacity.³ This view, if it implies that the *lex loci* exclusively governs the matter, is clearly untenable, for it would enable a party to evade an incapacity imposed upon him by the law that governs the contract in other respects by the simple device of concluding the contract in a country where the law is more favourable. Moreover, the *lex loci* is ill adapted to govern the matter if, as may well happen, the parties conclude the contract in a place where they are only transiently present.

It is, however, now generally agreed that capacity is regulated by the proper law of the contract, provided that this expression is taken to mean the law of the country with which the contract is most substantially connected.⁴ Intention cannot here be allowed free play.⁵ A person cannot confer capacity upon himself by deliberately submitting himself to a law to which factually the contract is unrelated. For example:

¹ Wolff, *op. cit.*, p. 282.

² See Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 270 et seqq.

³ *Baindail v. Baindail*, [1946] P. 122, 128; Foote, *Private International Law* (5th ed.), p. 376.

⁴ Dicey, p. 769.

⁵ *Cooper v. Cooper* (1888), L.R. 13 App. Cas. 88, 108, *per* Lord Macnaghten.

Lex loci contractus not satisfactory

Capacity is governed by the proper law in the objective sense

The plaintiff, an English merchant, makes a contract in Paris with the defendant, a person domiciled in England and over twenty but under twenty-one years of age, by which he agrees to sell non-necessary goods to the defendant, delivery and payment to take place in London. It is expressly stipulated that the contract shall be governed by Swiss law.

Objectively regarded, this is an English contract void by English law and it would be idle to suggest that it is validated by the reference to Swiss law. But if it were made by the English infant with a Swiss merchant and if it related to acts performable solely in Switzerland, it would not be unprincipled to recognize its validity according to Swiss law. This law admittedly governs the valid formation of the contract in other respects and it seems only sensible that its control should extend to the question of capacity. It is true, of course, that the defendant would escape from an incapacity imposed upon him by the English law of his domicile, but quite apart from the fact that the contract has no material connexion with England, it does not follow, as we have seen, that the English rule is intended to affect transactions of a substantially foreign character.

*Male v.
Roberts*

That the proper law objectively ascertained regulates capacity is not inconsistent with the decision of Lord Eldon in *Male v. Roberts*, the only relevant authority.¹

Facts:

The defendant, an infant domiciled in England, was sued upon what may be called a Scottish contract that he had made in Edinburgh. Lord Eldon, in dealing with his plea of infancy, said that his omission to give evidence of Scottish law upon the matter was fatal to this defence, since 'the law of the country where the contract arose, must govern the contract'.

On the surface, this statement favours the *lex loci contractus*. The inference is otherwise, however, if the words are translated into language appropriate to the present state of private international law. In effect Lord Eldon ruled that capacity is governed by the law that governs the contract. In his time, and indeed for many years afterwards, the judges, when required to identify the governing law of a contract, laid overwhelming stress upon the *locus contractus*. After a century and a half of development, however, a more flexible test has been evolved, and the modern equivalent of 'the law of the country where the contract arose' is the law of the country with which the contract has the most substantial connexion.

¹ (1800), 3 Esp. 163.

II. FORMATION OF THE CONTRACT

1. *Formation of the agreement*(i) *The fact of agreement.*

The first essential to the creation of a valid contract is that the parties should have reached agreement—that there should be *consensus ad idem*. In one sense this is a question of fact dependent upon whether there has been the acceptance of an offer, but what constitutes an offer and its acceptance is a matter of law, and in a foreign element case the answer may vary with the legal system that is chosen to govern the question, since the criterion of a completed agreement is not the same everywhere. Thus some systems take a contrary view to English law and hold that the silence of the offeree may constitute acceptance.¹ There is also a divergence of view upon the moment at which an acceptance becomes effective and irrevocable. There are three main theories:²

First the mail-box or dispatch (*expedition*) theory, current in common law countries, which regards agreement as complete upon the mere posting of the acceptance, irrespective of whether it reaches the offeror.

Secondly, the theory of reception, according to which there is no agreement until the acceptance is received.³

Thirdly, the theory of knowledge, which requires that the acceptance should come to the knowledge of the offeror.⁴

This diversity may produce a difficult problem. Suppose, for instance, that:

A mails an offer in London to *B* in Hamburg; *B* mails an acceptance in Hamburg, but his letter is lost. By English law there is a completed agreement,⁵ by German law there is not. Which law governs the matter?

What law determines whether agreement complete?

There are various possibilities, but two in particular may be mentioned, namely, the putative proper law⁶ and the *lex loci contractus*.

It is submitted that the former, i.e. the law that would be the proper law in the objective sense, assuming that a contract had

Claims of the putative proper law

¹ Wolff, op. cit., p. 439; Beale, op. cit., p. 1073.

² For a more detailed list see Visser, 19 *Revue de droit international et de législation comparée* (3rd series), pp. 90–91; Rabel, op. cit. ii. 453.

³ Germany, Austria, Norway, Sweden and Denmark.

⁴ Italy, Spain, Portugal, Belgium, Romania and Bulgaria.

⁵ *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216.

⁶ Advocated by Wolff, op. cit., p. 439.

been effectively created, should govern the matter.¹ It seems essential that the valid creation of a contract in all its aspects should as far as possible be subject to a single law. On this basis the governing law in the hypothetical case given above would depend upon whether the proposed contract would be more closely connected with England or with Germany.

English
law applies
the *lex loci*
contractus

There is little doubt, however, that the English judges prefer the theory of the *lex loci contractus*. Logically, of course, the application of this law is inadmissible, for if the question is whether the agreement was made it is a *petitio principii* to purport to apply the law of the country where it was made. Again, it is generally conceded that a contract is made where the last act necessary to constitute agreement is done. But since the last act is either the posting or the receipt of the acceptance according as English or German law is chosen, there is no option but to make a purely arbitrary choice. The escape from these difficulties is afforded by the fundamental principle of our private international law that a connecting factor, in this case the *locus contractus*, must be given its English meaning.² In the hypothetical case set out on the previous page, for instance, the court would identify Germany as the *locus contractus*, since it was there that the acceptance was posted.³

Thus, in *Benaim v. Debono*,⁴ where an offer to sell anchovies, which had been posted in Gibraltar, was accepted by a cable dispatched from Malta, the Privy Council said:

'No doubt this contract should be regarded as made in Malta, for thence came the final acceptance of the offer.'

Objections
to the *lex*
loci con-
tractus

To solve the question in this manner, by the extension of a purely domestic rule to a foreign element case, raises an exception to the principle that the creation of a binding obligation is a matter within the exclusive control of the proper law objectively ascertained, and it is not, indeed, entirely satisfactory in other respects, for if the rule is not the same in both countries the decision will vary with the forum in which action is brought. Again, the English post-office rule is admittedly

¹ Contrary to the submission made earlier in Cheshire, *International Contracts*, pp. 53-54.

² *Spura*, pp. 52-53. This is the view adopted in Italy, see the case of *Soc. Andre v. Soc. C.I.E.S.* in 1954, discussed in 4 *I. & C.L.Q.* 396-7.

³ *Benaim v. Debono*, [1924] A.C. 514; see also *The Queen v. Doutre* (1884), L.R. 9 App. Cas. 745, 751. By Art. 65, para. 1 of the proposed French code, a contract is deemed to be made in the place where the acceptance is given.

⁴ *Supra*.

arbitrary even in the field of domestic law, and it is ill adapted for cases involving a conflict of laws.¹

The mail-box doctrine adopted by English domestic law represents an exceptional and arbitrary rule based upon grounds of commercial expediency. The normal rule is that an acceptance is not complete until it has in fact been notified to the offeror, for until then it cannot be said that the minds of the parties have met. Thus if *A* and *B* are standing on opposite sides of the Anglo-Scottish border and an oral offer made by *A* in England is accepted orally by *B* in Scotland, the agreement is made in England since it is there that notification of the acceptance has been received by *A*. This normal rule applies to any case where the communications passing between the parties are instantaneous or practically so. If, for example, the offer is transmitted by Telex from London to Amsterdam and the acceptance is received on the offeror's Telex machine in London, the agreement has been made in England.² The same rule applies in the case of telephonic communications.

(ii) *The reality of agreement.*

An agreement in fact is not necessarily an agreement in law. Though apparent, it may not be real in the sense that it may have been due to the mistaken belief of one or both of the parties. What law, then, determines the effect of an alleged mistake? The question may be important, for the rules on the matter vary considerably in different legal systems. The German code, for instance, in direct opposition to English law, allows a party to avoid a contract on proof that he would not have made it had he known and appreciated the true facts.³

What law
governs
mistake?

If, for instance, in the hypothetical case suggested above of the acceptance posted in Hamburg,⁴ the English offer had been to sell certain machinery which the German mistakenly believed would fulfil the particular purpose for which he required it, the factual agreement resulting from his acceptance would be binding by English Law⁵ but voidable by German law.

¹ Cook, *op. cit.*, p. 369. Moreover, a rule directed to determining *when* a contract was made is not necessarily appropriate to determine *where* it was made.

² *Entores Ltd. v. Miles Far East Corporation*, [1955] 2 Q.B. 327.

³ See Schuster, *The Principles of German Law*, p. 95.

⁴ *Supra*, p. 233.

⁵ Presuming, of course, that there had been no misrepresentation and that the buyer had not made known to the seller the purpose for which he required the goods.

Governing
principles

There is no English authority, but two propositions seem clear on principle. First, the law which determines whether an apparent agreement has been made must also determine whether the agreement is real. There are two constituent elements of a legal agreement—consent in fact or in the eyes of the law, and consent free from what the law regards as operative mistake. Logically, these two elements should not be separated and assigned to different laws. The formation of agreement constitutes a single question submissible to one and the same law. Secondly, the question whether agreement has been prevented by operative mistake should be left to the putative proper law—the law to which the contract naturally belongs—and not to the *lex loci contractus* as such, for the mere place of contracting is an insubstantial ground upon which to determine what law shall govern a matter so vitally affecting the creation of the obligation.

If, therefore, it becomes finally and firmly established that the existence of an apparent agreement is governed by the *lex loci contractus*, it is to be hoped that the courts will defy logic and will not extend the rule to the question of reality of agreement.

2. Conversion of agreement into a binding contract

(i) Formal validity.

No decisive
authority

The identity of the law that governs the formal validity of a mercantile contract has not yet been judicially considered in England. Early juristic opinion, now mostly abandoned, advocated the rigid and exclusive application of the maxim *locus regit actum*. A contract was to be void unless it complied with the formalities of the *lex loci contractus*. The local formalities were not only optional, but compulsory.

Compliance
with *lex loci*
contractus
sufficient

There can be no doubt that compliance with the local form is sufficient,¹ though in other respects the contract may be totally unconnected with the *locus contractus*. This is defensible on grounds of justice and convenience, for it is essential that parties who conclude their contract in a given country should be free to follow local professional advice upon the form necessary for the creation of a binding obligation.

Compliance
with *lex*
loci con-
tractus not
essential

There is, however, neither justification nor authority for the view that observance of the local form is compulsory. If, for instance, two Englishmen make a contract by which the one agrees to act in a play to be produced by the other at a

¹ *Guepratte v. Young* (1851), 4 De G. & Sm. 217.

London theatre, the mere fact that they sign a memorandum to this effect in some foreign place scarcely requires that the one question of formal validity should be tested exclusively by the *lex loci contractus*. The place may be accidental. It may even be uncertain, as, for instance, when the parties conclude the transaction in the Simplon-Orient express to Istanbul. Moreover, if English law governs the contract in every other respect, as obviously it does, why should the single question of formal validity be imperatively referred to another law?¹ It has been usual in the past to vindicate the exclusive application of the *lex loci contractus* by relying upon the rule that the *lex loci celebrationis* governs the formal validity of a marriage ceremony² and also upon certain dicta culled from cases dealing with the effect of a failure to stamp a document according to the revenue requirements of the place of execution.³ The marriage rule may be dismissed as irrelevant, for it is obvious that a marriage ceremony stands in a category of its own. The official who performs the ceremony cannot do otherwise than satisfy the regulations of the local law which it is his duty to administer. As for the stamp cases, there are a few dicta, but nothing more, to the effect that if for want of a stamp a contract is not merely inadmissible in evidence but altogether void by the law of the place where it is made, it cannot be enforced in England.⁴ This, however, is nothing more than a particular application of the objectionable proposition that merely because the parties happen to conclude their contract in a certain place they are inexorably bound to observe the local formalities.

Though on grounds of convenience the parties may imbue their contract with formal validity by adopting the forms usual in the place where they conclude the transaction, it is now generally agreed that it is sufficient if they comply with the requirements of the proper law.⁵ *Van Grutten v. Digby*,⁶ though it was not concerned with a mercantile contract, supports this view that the proper law is the alternative to the *lex loci contractus*. It was there held that a pre-marriage settlement contract

Compliance
with the
proper law
is sufficient

¹ See Wolff, *op. cit.*, p. 446.

² *Kent v. Burgess* (1840), 11 Sim. 361; *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

³ *Alves v. Hodgson* (1797), 7 T.R. 241; *Clegg v. Levy* (1812), 3 Camp. 166; *Trimbey v. Vignier* (1834), 1 Bing. N.C. 151; *Bristow v. Sequeville* (1850), 5 Ex. 275.

⁴ *Bristow v. Sequeville* (1850), 5 Ex. 275, 279, *per Rolfe B.*

⁵ Dicey, *op. cit.*, p. 774; Wolff, *op. cit.*, pp. 448-9.

⁶ (1862), 31 Beav. 561.

made by an Englishwoman in France with English formalities was not invalidated by its failure to satisfy the French formalities. English law was the proper law of the contract.

(ii) *Essential requirements other than form.*

Putative
proper law
governs

In some legal systems the mere consent of the parties suffices to create a binding obligation, in others something more is required. A comparison of Scots and English law with regard to consideration discloses one important example. In Scotland, apart from certain classes of contract required to be in writing,¹ it is sufficient that the promisor should intend to bind himself and should express that intention in clear words.² In England and other common-law countries a contract not under seal is void unless supported by consideration. Since requirements of this nature are essential to the *creation* of a valid contract, the question whether they are binding in a particular instance must be determined by some law independent of the volition of the parties. In the nature of things this can only be the putative proper law, i.e. the law of the country with which the contract, presuming it to be valid, will have the most substantial connexion. Thus in one case, a contract which was connected exclusively with Italy, except that the promisor's estate against which a remedy was sought was situated in England, was held to be enforceable, notwithstanding its lack of consideration.³

Illustrated
by con-
sideration

Illustrated
by wager-
ing con-
tract

Another example is afforded by the English rule that a wagering transaction creates no obligation whatsoever, even though it may satisfy all the other requirements of a valid contract.⁴ In some other countries, however, such a transaction is valid. Therefore, whether a wagering contract is enforceable in England depends upon whether it creates a valid obligation according to the law of the country with which it is most closely connected. Thus it is well settled that money won at play or lent for the purposes of play is recoverable by action in England, provided that it is recoverable in the country where it was lost or won.⁵ On the other hand, a wagering contract is not enforceable if its most substantial connexion is with England, though it may have close contact with a country where

¹ See Gloag, *The Law of Contract* (2nd ed.), p. 162.

² *Morton's Trustees v. Aged Christian Friend Soc.* (1902), 3 F. 75, 78.

³ *In re Bonacina*, [1912] 2 Ch. 394.

⁴ Gaming Act, 1845, S. 1.

⁵ *Quarrier v. Colston* (1842), 1 Ph. 147; *King v. Kemp* (1863), 8 L.T. 255; *Saxby v. Fulton*, [1909] 2 K.B. 208.

an action lies for the recovery of a lost bet. This is well illustrated by *Moulis v. Owen*.¹

The defendant gave to the plaintiff in Algiers a cheque drawn on an English bank for money which he had borrowed from the plaintiff in order to play at baccarat in the local club. The loan and the cheque were valid by French law. The plaintiff sued in England on the cheque.

He failed for the simple reason that he sued on the cheque, not on the loan. The contract contained in the English cheque was governed by English law, as being the law of the country with which the contract had the most substantial connexion. As Kennedy L.J. said in a later case:

'In a transaction which culminated in the giving of a cheque payable in England, the question at issue ought to be regarded as governed by the law of England.'²

Incongruous though it may seem, one result of drawing the distinction between a security and the contract in respect of which it has been given is that a person, who receives an English cheque in payment of a gambling loan made in a country where gambling is lawful, may disregard the cheque and successfully maintain an action on the loan.³ His possession of an unenforceable security does not preclude him from recovering the money on the alternative ground.

Another example of a requirement essential to the creation of a valid contract is that the type of obligation undertaken by the promisor should be legally effective. Legal systems do not always agree on this matter. Thus the general English rule, subject to certain exceptions, is that a promise made by *A* to *B* to confer a benefit on *C* is not enforceable by *C*, since there is no privity of contract between him and *A*. On the other hand, Scots law allows *C* to sustain an action against *A*, upon proof of a clear intention in the contracting parties to confer the benefit upon him.⁴ A conflict of this nature between two internal laws may raise a problem of the choice of law.

Illustrated
by doctrine
of privity
of contract

Suppose that *A & Co.*, an English firm carrying on business in England, promises *B*, one of its employees who is domiciled in England, that in certain eventualities it will pay £5,000 to *B*'s daughter, *C*. The

¹ [1907] 1 K.B. 746.

² *Saxby v. Fulton*, [1909] 2 K.B. 208, 233.

³ *Société Anonyme des Grands Établissements du Touquet Paris-Plage v. Baumgart*, [1927] 96 L.J. (K.B.) 789; *aliter* in a purely domestic case, *Carlton Hall Club v. Laurence*, [1929] 2 K.B. 153.

⁴ Gloag, *The Law of Contract*, pp. 235 et seqq.

money is to be paid to an English bank to the credit of *C*. At all material times *C* is resident and domiciled in Scotland and there is an express stipulation that the contract shall be governed by Scots law.¹

This is an English contract in the objective sense, and it seems clear that its control by English law cannot be ousted by the express selection of Scots law. The question is whether a valid enforceable right has in fact been created in favour of *C*.² Her claim goes to the validity of the contractual obligation.³ It is not determinable by any law in the world that the parties may have seen fit to choose, but by the law to which in the circumstances the contract naturally belongs. This conclusion is implicit in the decision of the Queen's Bench in *Scott v. Pilkington*.⁴

③. *Legality of purpose*

The proper law is not the exclusive arbiter of illegality

So far we have seen that with two slight exceptions⁵ the proper law, i.e. the law of the country with which the contract has the most substantial connexion, and no other, determines the question whether an obligation has been validly and effectively created. In the particular matter of illegality, however, though it certainly affects the creation of contract, it is no longer possible to refer exclusively to the proper law. It may be necessary in addition to take account of other legal systems. It is obvious, for example, that no action will lie on a foreign contract which, though valid by its proper law, is regarded as morally reprehensible by the *lex fori*. Again, it has been said that a court ought not to enforce a contract, whatever its proper law may be, if its performance is illegal by the *lex loci solutionis*. We must consider, therefore, the different systems of law to which an issue of illegality must be referred. The answer may be given in five propositions, of which only the fourth is doubtful.

¹ Founded on *Re Schebsman*, [1944] Ch. 83, a similar case, but containing no foreign element, in which the Court of Appeal held that the money was not recoverable at the suit of *C*.

² Cp. *Brown v. Ford Motor Co.* (1931), 48 F (2d) 732 (Oklahoma).

³ *Lawrence Bank v. Rice* (1936), 82 F (2d) 22.

⁴ (1862), 2 B. & S. 11; cp. *Hartmann v. König* (1933), T.L.R. 114, where, however, there was no express choice of law; see, generally, Cheshire, *International Contracts*, pp. 68-69.

⁵ Namely, that the fact of agreement is determinable by the *lex loci contractus* (*supra*, p. 233), and that compliance with the forms required by the *lex loci contractus* renders the contract formally valid; *supra*, p. 236.

First, it is axiomatic that a contract which is illegal by its proper law cannot be enforced in England.¹

Secondly, no action lies in England upon a contract which infringes the distinctive public policy of English law. This doctrine and the danger that it may be pushed too far have already been sufficiently discussed.²

These two rules are undoubted, but the question of their interrelation deserves attention. It may be illustrated by the case of *Boissevain v. Weil*,³ where the facts were these:

(i) Unenforceable if illegal by proper law ✓
(ii) Unenforceable if contrary to public policy ✓
Interrelation of these two rules

Fact. In 1944, the respondent, a female British subject involuntarily resident in Monaco during the German occupation, borrowed 960,000 French francs from the appellant, a Dutch subject also involuntarily resident in the same place. She agreed to repay the loan in London at the rate of 160 francs to the pound as soon as possible after the war. She also gave to the appellant cheques to the value of £6,000, drawn on a London bank at which in fact she had no account, together with a letter to the manager requesting him to honour them as soon as it was lawful to do so.

At the time of the transaction, a Defence Regulation, made under the powers conferred by the Emergency Powers (Defence) Act, 1939, was in force, which provided that without Treasury permission no person other than an authorized dealer should buy or borrow any foreign currency. The Act of 1939 provided that defence regulations made under its provisions should apply *inter alia* to all British subjects with certain exceptions inapplicable to the respondent.⁴

Both the Court of Appeal and the House of Lords agreed that the loan was irrecoverable, but their reasons were divergent.

In the Court of Appeal Tucker L.J. proceeded on the ground that the statutory order was intended to have extra-territorial effect and that the defendant herself and the transaction into which she had entered came directly within its ambit. Denning L.J., however, dismissed the action on the ground that English law was the proper law of the contract in the sense that it was 'most essentially connected with' England and that its illegality by that law was a fatal bar to the

¹ *Heriz v. Riera* (1840), 11 Sim. 318; *Kahler v. Midland Bank Ltd.*, [1950] A.C. 24, but *quaere* whether the proper law was correctly ascertained, see 3 *I.L.Q.* 255, 13 *M.L.R.* 206; *Zivnostenska Banka National Corp. v. Frankman*, [1950] A.C. 57; *supra*, pp. 152-4.

² *Supra*, pp. 154 et seqq.

³ [1949] 1 K.B. 482 (C.A.), aff. [1950] A.C. 327.

⁴ Defence (Finance) Regulations, 1939, reg. 2, as amended; Emergency Powers (Defence) Act, 1939, S. 3, sub-s. 1.

appellant's right of recovery. In his view a statute has extra-territorial effect only when the proper law is English, so that if, for instance, while the regulation was in force, a British subject had borrowed dollars in New York and had promised to repay the loan there in dollars, the validity of the contract would have been unaffected by the English legislation. Nevertheless, the learned Lord Justice agreed that an action brought in England on the loan could have been met with the defence of public policy, for 'the validity of a contract is one thing and its enforcement another'.¹

On the other hand, Lord Radcliffe, whose opinion received the unqualified assent of the other Law Lords, stressed the imperative nature of the statutory regulation which made it an offence, subject to severe penalties, for a British subject to carry out certain currency transactions, and he declared that whether such an offence has been committed cannot depend upon whether the proper law is English or foreign. It is suggested with respect that this line of approach tends to distort the role of an imperative domestic rule in the sphere of private international law. It confuses the normal with the abnormal application of the English *lex fori*.² The normal principle is that a foreign right, validly acquired under its governing law, is enforceable by action in England, and that English domestic law is irrelevant. The abnormal principle is that the right will not be enforced if it comes into conflict with English public policy. But there is no such conflict merely because it is inconsistent with some statutory rule, however imperative the language of the enactment may be. The statutory rule, for instance, that a lottery is illegal is no more imperative than the common-law rule which attaches the stigma of illegality to a contract for the commission of a crime.³ Before repudiating the foreign right, the court must go further and must satisfy itself that the imperative rule is not one which merely affects persons individually, as, for example, a prohibition against marriage under a certain age, i.e. a rule of *ordre public interne*, but one designed to protect an interest regarded as essential to the social, moral or economic welfare of the community, in other words, a rule of *ordre public international*. Had the contract of loan in *Boissevain v. Weil* been governed by the law of Monaco and had been

¹ [1949] 1 K.B. at p. 491.

² Niboyet, *Traité de Droit International Privé*, iii. 493, cited by Kahn-Freund, 39 *Transactions of the Grotius Society*, 64-65.

³ See, for example, *Santos v. Illidge* (1860), 8 C.B. (N.S.) 861.

valid by that law, the action would no doubt have failed, but it would have failed not because the statutory order in unrestricted terms forbade the very act that had been done, but because its unqualified application was economically a matter of imperious necessity. One function of private international law no doubt is to define the circumstances in which the *lex causae* must stand excluded, but if every statute of an imperative nature is to be construed as affecting *ordre public international* the inevitable and pernicious result must be the unwarranted sacrifice of the normal rules for the choice of law.¹

Thirdly, a contract which is valid by its proper law does not become unenforceable in England merely because it is illegal according to the *lex loci contractus*. Suggestions have been made that the mere place of contracting is decisive upon the question of illegality, but in so far as they are judicial they have been made in cases where the *lex loci* was also the proper law of the contract.² On practical grounds the suggestion has nothing to commend it. 'If a letter, by which a contract between an Englishman in London and a Swiss firm in Lucerne is accepted, is posted in Milan where the making of the contract would be unlawful, while nothing would be unlawful if the letter had been posted either in London or Lucerne', the suggested rule would render the contract unenforceable in England.³ What is more important is that the suggestion is inconsistent with the decision of the Court of Appeal in *In re Missouri Steamship Company*,⁴ where the facts were as follows:

(iii) Illegality by *lex loci contractus* as such is immaterial ✓

Facts: A contract was made in Massachusetts between an American citizen and English shipowners by which the latter agreed to carry cattle from Boston to England in an English ship. There was a clause expressly exempting the shipowners from liability for the negligence of the master or crew. This stipulation, though valid by English law, was void in Massachusetts as being contrary to public policy. The cattle were lost owing to negligence and the shipowners were sued for damages.

¹ Upon the danger of treating every imperative statute as a matter of *ordre public international* see especially Kahn-Freund, 39 *Transactions of the Grotius Society*, 39-69. Compare also Wolff, op. cit., pp. 168 et seqq.

² *Quarrier v. Colston*, (1842), 1 Ph. 147; *Saxby v. Fulton*, [1909] 2 K.B. 208; *Branley v. S.E. Ry. Co.* (1862), 12 C.B. (N.S.) 63; *The Torni*, [1932] P. 78, 88.

³ 18 *B.Y.B.I.L.* (1937), 104. See also Wolff, op. cit., pp. 343-4; Dicey, op. cit., p. 782.

⁴ (1889), 42 Ch.D. 321; *Jones v. Oceanic Steam Navigation Co. Ltd.*, [1924] 2 K.B. 730.

It was held that the intention of the parties, apparent from the terms of the contract, was to submit themselves to English law, and that the clause removing liability for negligence was effective. In other words, the contract was more substantially connected with England than with Massachusetts, and therefore the invalidity of the exemption clause in the latter country was irrelevant.¹

(iv) *Quaere*, is illegality by *lex loci solutionis* necessarily fatal? The fourth and doubtful proposition relates to illegality by the *lex loci solutionis*. It is no doubt true that by English domestic law an agreement to perform an illegal act is unenforceable. In accordance with the domestic doctrine of frustration an agreement to perform what it later becomes illegal to perform is equally unenforceable. But the question is whether these domestic rules apply where the illegality exists by virtue of a *lex loci solutionis* which is not the proper law of the contract. At first sight, it would appear from certain judicial statements that in such circumstances an action to enforce the contract must necessarily fail. Thus, in one case, Lord Wright described

‘the well-known proposition that an English court will not enforce a contract where performance of that contract is forbidden by the law of the place where it must be performed’

as too firmly established to require any further discussion.² It has, however, been convincingly shown that to attribute this unqualified effect to the *lex loci solutionis* is contrary to doctrine, since it may involve an unjustifiable disregard of the proper law if the contract is governed by a foreign legal system.³ This

¹ It is true that the judges were a little mystifying in some of their statements, especially Lord Halsbury, when he said: ‘Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all the world over, and no civilized country would be called on to enforce it’; p. 336. Does this mean that the views of the *lex loci contractus* upon the degree of obliquity attributable to an illegal contract determines its enforcement in England? The tendency of the judgments was to regard the stipulation which offended public policy as void, but not illegal, by Massachusetts law. Fry L.J., for instance (at p. 342), described a contract in restraint of trade as void, not illegal, at common law. Is it not more accurate to describe it as illegal and therefore void? The mere fact that the contract is not void *in toto* does not remove the taint of illegality from the restraint itself; see Cheshire and Fifoot, *The Law of Contract* (5th ed.), pp. 275, 323 et seqq.

² *Rex v. International Trustee*, [1937] A.C. 500, 519. To the same effect, Lord Sankey in *De Beêche v. South American Stores*, [1935] A.C. 148, 156; Lord Normand in *Kahler v. Midland Bank*, [1950] A.C. 24, 36.

³ 18 *B.T.B.I.L.* 107-13 (Dr. Mann); Wolff, *op. cit.*, pp. 444-5; Falconbridge, *Conflict of Laws* (2nd ed.), pp. 391-4; Rabel, *op. cit.* ii. 535-9.

may be clarified by a hypothetical example of a contract governed by German law.

A German shipowner, by a contract made in Hamburg, agrees with a German merchant to carry a cargo of jute in a German ship from Calcutta to Barcelona at a freight fixed in marks but payable in Barcelona. At the time when payment falls due the Spanish Government has issued a decree ordaining that freight on jute shall not exceed a sum which is considerably lower than the contractual rate.

If an action is brought in England to recover freight at the contractual rate, will it be a decisive argument against the claim that payment of the agreed amount has been rendered illegal by Spanish law? The argument is unacceptable, for the extent to which the rights and obligations of the parties are affected by the Spanish decree is a matter within the exclusive control of German law *qua* the proper law of the contract. English law, as being merely the *lex fori*, has no right to determine this question. The effect of illegality varies greatly in different legal systems,¹ and there is no justification for imposing a particular rule of English domestic law on foreign contractors merely because the action is brought in England. According to one writer, for instance, German law would probably allow recovery of the agreed sum in the case of our hypothetical contract, since it would take the view that owing to the supervening Spanish legislation the place of payment was no longer Barcelona, but Hamburg.² Again, different legal systems have different views as to what constitutes the place of performance. If, for instance, by a contract subject to French law, the defendant resident in France agrees to pay money to the plaintiff resident in Switzerland, the place of performance is Switzerland according to English and Swiss law, but France according to French law.³ If the payment were later made illegal by Swiss law, would the court be furthering the ends of justice by disregarding the French view?

The proposition that a contract which is illegal at the place of performance is necessarily unenforceable in England is not supported by the actual decisions generally cited in its favour.⁴ Some of them merely apply the principle that a contract, subject to a foreign law, is not enforceable if it offends the English doctrine of public policy.⁵ Others, including *Ralli v. Compania*

No decisive
authority
that
illegality by
lex loci
solutionis is
necessarily
fatal

¹ Wolff, *op. cit.*, p. 445.

² Dr. Mann, 18 *B.Y.B.I.L.* 111.

³ Wolff, *op. cit.*, p. 135.

⁴ 18 *B.Y.B.I.L.* 109.

⁵ *Foster v. Driscoll*, [1929] 1 K.B. 470.

Naviera Sota y Aznar,¹ which is the mainstay of those who advocate the proposition, have been concerned with cases where the proper law was English and where in consequence the court applied the domestic rule that a contract to perform what it has become illegal to perform is not enforceable.² The facts of that case were in general similar to those supposed in the hypothetical example given above, except for this vital difference, that the proper law of the contract, which fixed a freight of £50 per ton, was English law. The court, therefore, was bound to apply and did in fact apply the internal law, not the private international law, of England.³ The familiar English cases dealing with impossibility of performance were cited and Scrutton L.J. summed up their effect upon the instant facts in the following words:

‘Where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that State.’⁴

The essential fact to realize is that no case has yet arisen requiring the court to consider the effect of illegality at the foreign place of performance upon a contract, the proper law of which is the law of still another foreign country. When it does arise, there is a danger that the frequent dicta attributing decisive effect to illegality by the *lex loci solutionis* will prevail, despite the indifference that they display to general principles.

The last and rather obvious proposition is that a contract is not unenforceable in England merely because performance is illegal by the law of the country in which the promisor carries on his business or to which he belongs by nationality or domicile, provided that the contract is not subject in other respects to the law of that country.⁵

¹ [1920] 2 K.B. 287.

² *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589; *Kursell v. Timber Operators and Contractors Ltd.*, [1927] 1 K.B. 298; *De Beêche v. South American Stores*, [1935] A.C. 148; *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1937] 3 All E.R. 349.

³ See particularly, Falconbridge, *Conflict of Laws* (2nd ed.), pp. 389-94, where at p. 392 he says: ‘If by English conflict rules the proper law is English law, then domestic rules of English law are to be applied, and by one of those domestic rules the contract is invalid so far as the contract requires an act of performance to be done in a foreign country and by the law of that country the act is illegal.’

⁴ [1902] 2 K.B. at p. 304.

⁵ *Kleinwort Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft*,

(v) Illegality by *lex patriae* or *lex domicilii* immaterial

III. INTERPRETATION

The stage has now been reached where a contract, formally and essentially valid and made between parties of full capacity, has been created. In the further matters that may require the intervention of the court there is, speaking generally, no reason in principle why the parties should not be free to select the governing law. This is certainly true in the case of interpretation.

The province of interpretation is to discover the true intent and meaning of the parties as expressed by the language of the contract.¹ This is a question of fact.² Nevertheless, a question of choice of law may arise, for if an expression is ambiguous and if it bears different meanings in different legal systems, its interpretation must be determined by reference to one only of these systems. Since the sole object is to attribute to the expression the meaning that the parties intended it to bear, the manifest solution in this event is to apply the law that they had in mind when they made their contract. If they have expressly stated that the contract is to be interpreted, construed or considered according to the law of a particular country, *cadit quaestio*. The meaning attributed to the expression by that law will prevail.³

In the absence of an express choice, their intention is a matter of inference. The legal background against which the expression was adopted must be inferred from the language of the contract and its attendant circumstances. There is, of course, a strong presumption in favour of the proper law. But an intention that the parties had in mind some other law may well be the correct inference. If, for instance, they have used a technical expression which bears a definite meaning in country X, but is unintelligible to the proper law, it is only reasonable to infer that their minds were directed to the law of X.⁴ Again,

[1939] 2 K.B. 678; *British Nylon Spinners Ltd. v. Imperial Chemical Industries Ltd.*, [1955] Ch. 37; see 18 M.L.R. 65-70.

¹ *Berry v. Berry* (1616), 3 Bulst. 62, 67 per Coke C.J.

² *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 85, per Lindley L.J.

³ *Pena Copper Mines Ltd. v. Rio Tinto Co. Ltd.* (1911), 105 L.T. 846; *Indian & Industrial Trust Ltd. v. Borax Consolidated Ltd.*, [1920] 1 K.B. 529; *St. Pierre v. South American Stores*, [1937] 3 All E.R. 349, 354.

⁴ The point arose but did not require decision in *Rowett, Leakey & Co. v. Scottish Provident Institution*, [1927] 1 Ch. 55, where a contract of insurance contained the expression '*bona fide* onerous holder'. The expression is familiar to Scots law.

Doctrine of
autonomy
applies

Law ap-
plicable
depends
solely upon
intention,
express or
implicit, of
the parties

certain prima facie rules have been established which may facilitate the inquiry. To take one example, a contract of insurance is primarily to be interpreted according to the *lex domicilii* of the insurance company, i.e. the law of the country in which it is incorporated.¹

Meaning of words distinguished from their legal effect It is important in the present connexion, however, to distinguish two entirely different questions, namely, What meaning is to be attributed to a certain expression? and Can effect be given to that meaning? They are questions that are not necessarily governed by the same law. As Lindley L.J. said:

‘The expression “construction” as applied to a document, at all events as used by English lawyers, includes two things: first, the meaning of the words; and secondly their legal effect or the effect which is to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words is a question of law.’²

What legal effect, if any, can be allowed to the meaning intended by the parties is a matter of substance determinable by the proper law. In the case, for instance, of a contract for the transfer of a chattel as security for a loan, the parties may clearly intend that there shall be no right of redemption after a certain fixed period, but it is for the *lex situs* of the chattel to decide whether the right can be restricted in this manner.

IV. THE SUBSTANCE OF THE OBLIGATION

The task now is to identify the law that governs what is sometimes called the ‘essential’ or the ‘intrinsic’ validity of the contract, or its ‘effects’ or what may equally well be called the ‘substance of the obligation’. The stage has now been reached in our inquiry at which the obligation has begun to operate. The contract is in course of performance. Its effects are being felt. A variety of problems may require reference to a particular law, such, for instance, as the following:

Whether a carrier is liable for the loss of³ or injury to⁴ the goods or for delay in their delivery.⁵

Whether the defendant has a good excuse for the non-performance of the contract.⁶

¹ *Equitable Trust Co. v. Henderson* (1930), 47 T.L.R. 90.

² *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 85.

³ *P. & O. Steam Navigation Co. v. Shand* (1865), 3 Moo. P.C. (N.S.) 273.

⁴ *De Clermont v. Brasch* (1885), 1 T.L.R. 370.

⁵ *The San Roman* (1872), L.R. 3 A. & E. 583.

⁶ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

Whether the master of a ship is justified in selling the cargo at a port of distress.¹

Whether the loss of goods in transit is due to the 'perils' excepted by the bill of lading² or to the 'perils of the sea'.³

Whether an action lies for breach of promise of marriage.⁴

Whether an agent has exceeded his authority.⁵

Whether a contract is voidable for misrepresentation.⁶

Whether insurers under a fidelity guarantee are entitled to contribution from co-insurers.⁷

Whether currency restrictions prevent the payment of the amount due under the contract.⁸

Whether an insurer is liable to pay the sum assured.⁹

Whether a stipulation exempting the promisor from liability in certain events is effective.¹⁰

Whether a contract confers rights on third parties.¹¹

Whether a moratorium is effective.¹²

Whether a stipulation in a contract for the grant of a mortgage is void as being a clog on the equity of redemption.¹³

Whether an agreement in restraint of trade is enforceable.¹⁴

There is no room for doubt that all these matters and others of a like nature are governed exclusively by the proper law of the contract, subject to what has already been said as to illegality.¹⁵ Despite the invariable reference by the judges to the intention of the parties, the authorities cited above show that normally this law is the law of the country with which the contract has the most substantial connexion. The only conceivable controversy is whether this can be displaced by the express

Proper
law
governs
substance
of obligation

¹ *The August*, [1891] P. 328; *The Industrie*, [1894] P. 58.

² *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521.

³ *Greer v. Poole* (1880), 5 Q.B.D. 272.

⁴ *Hansen v. Dixon* (1906), 23 T.L.R. 56; *Kremezi v. Ridgeway*, [1949] 1 All E.R. 662.

⁵ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79.

⁶ *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W.R.) 18.

⁷ *American Surety Co. of New York v. Wrightson* (1910), 103 L.T. 663.

⁸ *Kahler v. Midland Bank*, [1950] A.C. 24; *Zionostenska Banka National Corporation v. Frankman*, [1950] A.C. 57.

⁹ *Spurrier v. La Cloche*, [1902] A.C. 446.

¹⁰ *Re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *Vita Food Products Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277.

¹¹ *Hartmann v. König* (1933) 50 T.L.R. 114.

¹² *National Bank of Greece and Athens S.A. v. Metliss*, [1958] A.C. 509.

¹³ *British South Africa Co. v. De Beers Consolidated Mines*, [1912] A.C. 52.

¹⁴ *South African Breweries Ltd. v. King*, [1899] 2 Ch. 173; aff. (1900) 1 Ch. 173.

¹⁵ *Supra*, pp. 240 et seqq.

In theory parties have unrestricted choice of proper law selection of a law with which the contract has an insignificant connexion or no connexion at all. As we have said, once a contract has been validly created according to the law to which objectively it belongs, there is no theoretical, and no great practical, objection to allowing full scope to the free will of the parties. In the case of a contract of carriage, governed as to its creation by English law, the question, for instance, whether the goods have been lost owing to the perils of the sea may without disturbing doctrine be determined according to Dutch law if the parties have expressly agreed to refer matters affecting the substance of the obligation to that law. Putting aside the arbitration cases,¹ it would seem, indeed, that where the law expressly chosen by the parties has been accepted by the courts as entitled to govern the substance of the obligation, there has, with one exception,² always been some factual connexion, and generally a substantial connexion, between the contract and the country of the chosen law. Nevertheless, the prevailing opinion is that no such connexion is necessary, except where the issue relates to the creation of a binding obligation.³

Performance is a matter of substance When the proper law and the *lex loci solutionis* are not identical, a fact deserving emphasis is that performance of the contract is a matter of substance to be governed by the proper law. At first sight the supposition may seem reasonable that questions affecting performance are subject to the law of the place where performance is due. There are, indeed, certain judicial statements which give this impression. Thus, in *Chatenay v. Brazilian Submarine Telegraph Company*,⁴ Lord Esher said:

'But if [the contract] is to be carried out partly in another country than that in which it is made, that part which is to be carried out in

¹ *Supra*, p. 222.

² *British Controlled Oilfields v. Stagg* (1921), 66 Sol. Jo. (W.R.) 18.

³ *Supra*, pp. 222 et seqq. Of course, the right of incorporating a foreign law as one of the terms of the contract is exercisable without restriction so far as the substance of the obligation is concerned; *supra*, pp. 229-30.

⁴ [1891] 1 Q.B. 79, 83; see also *Rex v. International Trustee*, [1937] A.C. 500, at p. 574, *per* Lord Roche; and *Hardy (M.W.) & Co. Ltd. v. A. V. Pound & Co. Ltd.*, [1955] 1 Q.B. 499, where at p. 512 Lord Goddard C.J. said: 'I agree with McNair J. that the proper law of the contract is English, but that its performance must be regulated by the law of Portugal'; see also at p. 510 *per* Singleton L.J. This statement seems to have been *obiter*, for the court apparently held that it was English law which cast upon the sellers, not upon the buyers, the duty of obtaining an export licence in Portugal, the place of shipment; for a criticism of the decision see 18 *M.L.R.* 405-8.

that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country.'

This is a little misleading. Different aspects of a contract may no doubt be governed by different laws. A question of interpretation, for instance, may be determinable by a different law from that which governs the creation of the contract, but once it is clear that a particular law governs substance it must govern in that respect exclusively. That performance is a matter of substance admits of no doubt. The term 'substance' in this context includes the extent of the obligation imposed upon each party, and in considering the extent of an obligation it is obviously necessary to take into account *inter alia* the grounds upon which its non-performance will be legally excusable, a matter upon which the proper law and the *lex loci solutionis* may well differ.¹ If the court were to allow a party to be excused for a reason good by the *lex loci solutionis* but inadmissible by the proper law, the unwarrantable result would be to vary the content of his obligation as fixed by the governing law. The contractual right of the promisee would be diminished.

This has now been recognized by English judges. After some hesitation,² it has been affirmed that the *lex loci solutionis* cannot be allowed to alter the substance of the obligation as fixed by the proper law, i.e. it cannot be allowed to qualify the rights and liabilities of the parties.³ It is no part of its function 'to change the substantive or essential conditions of the contract'.⁴ Thus it was held in *Jacobs v. Crédit Lyonnais*⁵ 1884. Jacobs v.
Crédit
Lyonnais ✓

'The mere fact', said Bowen L.J., 'that a contract of this description—made in England between English resident houses, and under

¹ *Louis-Dreyfus v. Paterson Steamships Ltd.* (1930), 43 F. (2d) 824 (U.S.A.); Cheatham, *Cases on the Conflict of Laws* (3rd ed.), p. 500, at p. 501.

² *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 151. On the matter generally see 6 *Vanderbilt Law Review*, 505 et seqq. (J. H. C. Morris).

³ *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, at pp. 240-1.

⁴ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 219, and other cases cited *infra*, pp. 258 et seqq.

⁵ (1884), 12 Q.B.D. 589.

which payment is to be made in England upon delivery of goods from up country in an Algerian port—is partly to be performed in Algeria, does not put an end to the inference that the contract remains an English contract between English merchants, to be construed according to English law and with all the incidents which English law attaches to the non-performance of such contract.¹

The *Mount
Albert* case

An even stronger example of the control of the proper law over performance of the obligation is afforded by *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*,² where the facts were as follows:

Facts: A New Zealand borough council raised a loan from a Victorian company and issued debentures in 1926 repayable in Victoria and bearing interest at the rate of £5. 13s. 9d. *per centum per annum* also payable in Victoria.

A Victorian statute of 1931, designed to rectify the financial instability of that period by calling for a common sacrifice from all, provided that interest due under existing mortgages should be reduced at a certain rate for a period of three years.

The *Privy Council* expressed its strong opinion that this statute, even if it extended to debentures, which was not the case, did not affect the obligation of the borrowers to pay interest at the agreed rate of £5. 13s. 9d. The amount payable was a matter of obligation that was subject exclusively to the law of New Zealand as being the proper law of the contract. There could not be one proper law to govern the creation of the obligation and another to govern its discharge.³

Position
illustrated
by agency
contract

The decision of the Court of Appeal in *Chatenay v. Brazilian Submarine Telegraph Co.*⁴—the case in which Lord Esher made the statement quoted above⁵—does not endorse the view that all questions affecting the performance of a contractual obligation fall to be determined by the *lex loci solutionis*. It merely illustrates the rule that the position of a principal with regard to third parties with whom the agent has contracted on his behalf is determined by the proper law of the contract made by the agent.

¹ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. at p. 603.

² [1938] A.C. 224.

³ The Victorian statute did not render payment of interest at the stipulated rate illegal (*ibid.*, p. 241), and therefore the alleged rule that a contract is unenforceable if performance is illegal in the place of performance (*supra*, pp. 244-6) was not relevant.

⁴ [1891] 1 Q.B. 79.

⁵ *Supra*, pp. 250-1.

Suppose that by a contract, the proper law of which is the law of country *X*, *P* appoints *A* his agent with authority to act in some other country.

Two entirely different questions may arise.

First, questions concerning the mutual obligations of *P* and *A* as, for instance, the extent of *A*'s authority and his rate of commission. These are governed by the law of *X* as being the proper law of the contract by which the agency has been created.¹

Questions arising between principal and agent

Secondly, questions arising out of a contract made by *A* in some country other than *X*, as, for example, the effect of a payment made by the third party to *A* or the liability of *P* to the third party if in fact *A* has exceeded his authority. The law applicable to these questions is traditionally described as the law of the country where the act of the agent is performed, i.e. where he exercises his authority.²

Questions arising between principal and third parties

'If I, residing in England,' said Lord Lyndhurst, 'send down my agent to Scotland and he makes contracts for me there, it is the same as if I myself went there and made them.'³

If, for instance, the agent is clothed with a general authority to act abroad, the principal will be bound by a contract which, in the view of the law of the country where it is made, is within the ostensible authority of that particular agent.⁴ Again, whether an undisclosed principal can sue or be sued upon a contract with a third party is determined by the law of the place where the agent acts.⁵ The same general rules apply to a contract made by a partner in a country other than that in which the partnership has its place of business.

But the emphasis upon the place where the agent acts is at bottom only a loose method of saying that questions arising between the principal and third parties are governed by the proper law of the contract made by the agent in pursuance of his authority. In general, it is perfectly accurate to identify the proper law with the law of the place where the agent acts. His

Proper law of agent's contract governs

¹ *Maspons v. Mildred* (1882), 9 Q.B.D. 530; aff. 8 App. Cas. 874.

² *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; *Sinfra Aktiengesellschaft v. Sinfra*, [1939] 2 All E.R. 675.

³ *Pattison v. Mills* (1828), 1 Dow. & Cl. 343, 363.

⁴ It is submitted that the decision of the Court of Appeal in *Ruby S.S. Co. v. Commercial Union Assurance Co.*, [1933] 39 Com. Cas. 48, is inconsistent with principle and authority, see Dicey, pp. 877-8; Falconbridge, op. cit., p. 437.

⁵ *Maspons v. Mildred* (1882), 9 Q.B.D. 530; 8 App. Cas. 874.

contract is made there and is usually performable there. Nevertheless, complete accuracy requires us to say that the position between the principal and third parties is regulated by the law of the country with which the contract made by the agent is most substantially connected. This appears to have been the meaning of Lord Esher, though he preferred to base the rule upon the presumed intention of the principal and agent. What he said in effect was that if in country *X* an authority exercisable in country *Y* was conferred by the principal upon his agent, the parties must have intended that its exercise should be subject to the law of *Y*.¹

Minor details of performance alone governed by *lex loci solutionis*

No great harm is done, however, by emphasizing the significance of the place where an agent acts, as long as we do not read into it any suggestion that the *lex loci solutionis* as such governs questions affecting the performance of a contract. That law, where it does not represent the proper law, has only a minor part to play. It is generally said that only matters connected with the mode of performance, as contrasted with those that affect the substance of the contract, lie within its province.² Analytically, this antithesis is difficult to sustain, and perhaps it is better to abandon any attempt at precision and merely to say that the minor details of performance fall to be governed by the *lex loci solutionis*. Examples of questions that have been reserved for that law are the money of payment, i.e. the currency in which a debt is dischargeable,³ the date at which a bill of exchange matures for payment,⁴ the date at which lay days begin to run,⁵ the hours during which delivery may be tendered,⁶ and the meaning to be attributed to the word 'alongside' in a stipulation providing that the cargo is 'to be taken from alongside the steamer'.⁷

V. DISCHARGE

Proper law governs discharge

There is no doubt, either on principle or authority, that discharge affects the substance of the obligation and that it is

¹ *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, 82-83.

² *Auckland Corporation v. Alliance Assurance Co.*, [1937] A.C. 587, 606; *Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society*, [1938] A.C. 224, 240.

³ *Ibid.*, [1938] A.C. at p. 241; *infra*, p. 267.

⁴ *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; Bills of Exchange Act, 1882, s. 72 (5).

⁵ *Norden Steam Co. v. Dempsey* (1876), 1 C.P.D. 654.

⁶ Dicey, p. 747.

⁷ 18 *B.F.B.I.L.* citing *The Turid*, [1922] 1 A.C. 397.

governed by the proper law of the contract.¹ This law determines, for instance, whether a contract is discharged by bankruptcy,² by the outbreak of war,³ by a moratorium⁴ or by subsequent impossibility;⁵ and whether a surety is discharged if the creditor accepts a part-payment from the principal debtor.⁶

It is important to consider the impact of this principle upon the novation of a debt. Novation is effected by a new contract which extinguishes an existing obligation by substituting for it another, as, for example, by changing one of the existing parties. If *A* owes *B* £100 under a contract for the sale of goods and later *A*, *B* and *X* agree that *X* shall pay the debt to *B*, the effect clearly is to discharge *A* from his liability for the price of the goods. Such a *substitutio personarum* involves two distinct elements or stages—first, the discharge of one debtor and then his replacement by another.⁷

This analysis becomes significant in a case containing a foreign element, for, since it is obvious that the discharge of the original debtor, *A*, will not be effective unless it is effective in the eyes of the law that governs his contract with *B*, it follows that where a conflict of laws occurs it is the proper law of the original contract that alone determines whether an alleged novation has extinguished *A*'s liability.⁸ This is true whether the debt is already due at the time of the novation or whether it will accrue due in the future.⁹ In short, the contractual nexus between *A* and *B* can be dissolved only by the law to which their contract is subject.

Suppose, for example, that a partnership, carrying on business in Ruritania and composed entirely of members resident and domiciled in that country, buys goods from an English supplier under a contract that is admittedly governed by English law. Before the price of the goods has been paid, *A*, one of the partners, retires from the firm. By English law, *A* is still personally liable for the price unless the English

¹ *Gibbs v. Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399; *Adams v. National Bank of Greece and Athens, S.A.*, [1960] 3 W.L.R. 8.

² *Gibbs v. Société Industrielle et Commerciale des Métaux*, *supra*.

³ *In re Anglo-Austrian Bank*, [1920] 1 Ch. 69.

⁴ *In re Helbert Wagg & Co. Ltd.*, [1956] Ch. 323; *National Bank of Greece and Athens, S.A. v. Metliss*, [1958] A.C. 509; *Adams v. National Bank of Greece and Athens, S.A.*, *supra*, especially at pp. 21–22, *per* Lord Reid.

⁵ *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

⁶ *Cp. Bellingham v. Freer* (1837), 1 Moo. P.C. 333.

⁷ *In re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, at pp. 84–85.

⁸ *Ibid.*, *aff. sub nom. Tomkinson v. First Pennsylvania Banking and Trust Co.*, [1960] 2 W.L.R. 969.

⁹ *Ibid.*

supplier has expressly or implicitly agreed with him and with the remaining partners that the latter shall be solely responsible for the debt. Suppose further that no such novation has been effected, but nevertheless that Ruritanian law regards all *A*'s partnership liabilities as extinguished by reason of his retirement.

On these facts, the law of Ruritania is no doubt the *lex situs* of the chose in action to which the English supplier is entitled, since it is in that country that the debtors reside; but the proper law, not the *lex situs*, determines a question of discharge, and therefore *A* would have no answer to an action brought against him in England for the price of the goods.

Assign-
ment of a
debt not a
case of dis-
charge

Such is the rule for the choice of law, then, when it is claimed that a debtor has been discharged from liability by virtue of a novation. What must be distinguished is the fundamentally different case of the substitution of one creditor for another. This, whether accomplished with or without the consent of the debtor, represents an assignment by the original creditor to another person of the title to the chose in action, but nevertheless it leaves that title intact.¹ As one writer has neatly put it, where there has been a change of debtors 'the contractual obligation has been altered', while where the creditors are changed 'the contractual obligation has been transferred but preserved'.² If, therefore, a debtor claims that he is no longer liable to the original creditor since the latter has transferred his right to the debt to a third person, the rule for the choice of law relevant to the assignment of choses in action must be applied. As will be seen in a later chapter, this is the proper law of the debt in the case of a voluntary assignment, but the *lex situs* where the assignment is involuntary.³

Exceptional
case of
Statutes of
Limitation

The relevance to the question of discharge of a statute of limitation, prescribing the period within which a cause of action must be litigated, is considered later.⁴

Inter-
national
money
obligations

The discharge of international money obligations deserves more detailed examination, not only because of its importance in the commercial world of today, but also because it is a striking illustration of the fundamental principle of the choice of law that matters affecting the substance of the obligation to pay are governed by the proper law, but that the actual mode of payment is governed by the law of the place of payment.⁵

¹ *In re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, at pp. 86-90; 22 *M.L.R.* 309 et seqq. (O. Kahn-Freund).

² 7 *I. & C.L.Q.* 611-12 (Michael Mann).

³ *Infra*, pp. 496-501.

⁴ *Infra*, pp. 685-9.

⁵ For fuller accounts see Mann, *The Legal Aspect of Money* (2nd ed.), pp. 182

The first point to observe is that the amount of money due, since it has been fixed by the contract itself, affects the substance of the obligation. It cannot be varied by some different rule obtaining in the country of payment,¹ for that would be to alter the contractual obligation.² Since the amount has been fixed by the contract itself, its ascertainment is normally not a matter of controversy, but where it has been expressed in a currency common to several countries and varying in value from country to country, as in the case of the pound, dollar or franc, the question whether the debt is to be measured, for example, in Australian or English pounds may be difficult to resolve. If, for instance, an English seller has agreed to sell goods to an Australian buyer for £500, the amount of cash due to the seller, with the Australian pound at a discount of 25 per cent. compared with the English pound, will depend upon whether the contractual currency is English or Australian. It is, therefore, essential in a case of doubt to ascertain the currency in which the parties intended the obligation of the debtor to be measured. In technical language the inquiry is directed to ascertaining the 'money of account',³ or as it may equally well be called the 'money of measurement'⁴ or 'contractual money'.⁵

Meaning
of 'money
of account'

In this and similar cases where the contractual money is not clearly identified, the currency in which the debtor must account is that which the parties had in mind or must be taken to have had in mind at the time when they concluded their bargain. Their intention in this respect is to be inferred from the terms of the contract read in the light of the attendant circumstances,⁶ and since the matter affects the substance of the obligation it must be considered in the light of the canons of construction and the presumptive rules recognized by the proper law of the transaction.⁷ No one factor is necessarily decisive. Thus, in one case a reference to pounds *sterling* may

Problem of
conflicting
currencies

et seqq.; Nussbaum, *Money in the Law*; Dicey, pp. 881 et seqq.; Wolff, pp. 460-76; 6 *Vanderbilt Law Review*, 512-26 (J. H. C. Morris).

¹ *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society*, [1938] A.C. 224; *supra*, p. 252.

² Lord Wright, *Legal Essays and Addresses*, p. 170.

³ Mann, *The Legal Aspects of Money*, p. 158, adopting Lord Tomlin in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 146.

⁴ Dicey, p. 901.

⁵ Nussbaum, *Money in the Law*.

⁶ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 221.

⁷ Mann, *op. cit.*, pp. 186 et seqq.

show that English pounds were intended,¹ but in another it may be impossible to infer such an intention.² One important factor is that a particular place has been chosen by the parties for payment of the debt, but again this may or may not be decisive. This may be shown by contrasting two leading cases.

In *Adelaide Electric Supply Co. v. Prudential Assurance Co.*:³

An English company, carrying on business in Australia, issued preference shares the dividends on which were payable in England. Six years later, by resolutions binding on the shareholders, new articles of association were framed providing that the management of the company should be transferred to Australia and that all dividends should be paid in and from that country.

The House of Lords construed the contract between the company and the shareholders, as varied by the amending articles, to mean that the newly agreed place of payment 'determined the substance of the obligation, i.e. the currency by which the obligation was to be measured'.⁴ Therefore the obligation to pay was discharged by a payment in Australian currency, notwithstanding that owing to the depreciation of the Australian pound this meant a loss to a shareholder in England. The decision, however, did not lay down any general rule that if a particular place is chosen for payment the *lex loci solutionis* must determine the measure of the obligation.

This has been made clear by the Privy Council in *Bonython v. Commonwealth of Australia*,⁵ where the facts were these:

In 1895 the Queensland Government issued debentures in 'pounds sterling', which provided that the principal sums should be payable on January 1st, 1945, either in Brisbane, Sydney, Melbourne or London at the option of the holders. Certain holders of Commonwealth Stock, into which the debentures had later been converted on the original terms, demanded either to be paid in London the nominal amount of their stock in English currency or to be paid in Australia the equivalent in Australian currency of such amounts of English currency.

¹ *De Bueger v. Ballantyne & Co.*, [1938] A.C. 452.

² *Bonython v. Commonwealth of Australia*, [1951] A.C. 202.

³ [1934] A.C. 122, as explained in *Payne v. Deputy Federal Commission for Taxation*, [1936] A.C. 497, 509, and *Bonython v. Commonwealth of Australia*, *supra*, at pp. 220-1. For criticisms see Mann, *op. cit.*, pp. 195-202; 6 *Vanderbilt Law Review*, 516-18.

⁴ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, 220. *National Bank of Australasia Ltd. v. Scottish Union & National Insurance Co. Ltd.*, [1952] A.C. 493; *National Mutual Life Association of Australasia Ltd., v. A.-G. for New Zealand*, [1956] A.C. 369.

⁵ *Supra*.

The Privy Council refused the demand. Had payment been due in London only, that would indeed have been 'an important factor', but London was only one of four possible places. The substance of the obligation was the same in every case and it could not be varied between the debenture-holders merely because some elected to be paid in London, others in Australia. The true inquiry was to identify the monetary system that was in the minds of the parties at the time of the issue in 1895 or, to put it in another way, to identify the proper law by which the substance of the obligation, including the determination of the money of account, was governed. There was 'overwhelming evidence that it was to the law of Queensland that the parties looked for the determination of their rights'.¹ The debentures were issued on the authority of a Queensland Act and were secured on the public revenues of the Colony. The natural inference was that the Queensland Government would treat in the terms of its own currency.

'The Government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms are apt to refer to another system also. It may be possible to displace that presumption, but, unless it is displaced it prevails, and, if it prevails, then it follows that the obligation to pay will be satisfied by payment of whatever currency is by the law of Queensland valid tender for the discharge of the nominal amount of the debt.'²

Once the money of account is established, once it is clear for instance that £700 English pounds are payable, the principle of nominalism applies and the debt then becomes dischargeable by the tender of pounds to the nominal value of seven hundred. What represents the nominal value must be determined by English law, for the nominal value of any unit of account, whether pound, dollar or franc, must of necessity be fixed by the *lex pecuniae*, i.e. the law of the country in which the unit has been issued. Therefore a debtor is discharged by the delivery of such chattels, whether coins, notes or anything else, as represent, at the time when performance is due, legal tender and legal currency in the country whose money has been specified.³ The fortunes, good or bad, that have befallen the currency in

Nominal
value of
money of
account
represents
amount
due

¹ *Bonython v. Commonwealth of Australia*, [1951] A.C. 202, at p. 221.

² *Ibid.*, at p. 222.

³ *Pyrmont Ltd. v. Schott*, [1939] A.C. 145; *Marrache v. Ashton*, [1943] A.C.

the interval between the making of the contract and the time of performance are irrelevant.

Deprecia-
tion of
money of
account
immaterial

It follows that if the money of account has depreciated in value the creditor will receive less in real value than the amount fixed by the contract. A striking example of this is afforded by *In re Chesterman's Trusts*,¹ where the facts were these:

By a deed executed in 1911 and expressly made subject to English law, a German national mortgaged his share under an English trust fund to a Dutch bank as security for a loan of 31,000 marks. At that date the lender would have been entitled by German law to insist upon repayment in gold marks, but the law was altered after the outbreak of the 1914 War by a statute which provided that an obligation to pay a specified sum in marks should be dischargeable by the delivery of paper marks to the same nominal amount. The intrinsic value of 31,000 paper marks in 1923, the date of repayment, was very greatly less than the value of 31,000 gold marks at the time of the loan.²

It was held that repayment in the depreciated paper currency discharged the obligation of the debtor. The contract to repay the money of account, i.e. a given number of German marks, was a contract to repay whatever might be legal tender at the time of repayment, not at the time of the contract, in the country where the mark circulated.

✓ System of
revaloriza-
tion obtains
in some
countries

To meet such cases of currency depreciation, certain countries have adopted a system of revalorization under which a debtor must in certain circumstances pay to the creditor more units of account than those fixed by the original transaction.³ Thus, after the German reichsmark had been substituted for the mark the German courts, taking advantage of article 242 of the Code, which runs,

'the debtor is bound to effect the performance of his obligation according to the requirements of good faith',

would order a debtor owing a sum in the old currency to pay such a sum in reichsmarks as, having regard to all the circumstances of the case, appeared to be just.⁴

¹ [1923] 2 Ch. 466. See also *Ottoman Bank of Nicosia v. Chakarian*, [1938] A.C. 260.

² Apparently the lender would receive about £1. 15s. instead of £1,500.

³ Mann, op. cit., pp. 74 et seqq.; Wolff, pp. 465-6.

⁴ *Re Schnapper*, [1936] 1 All E.R. 322, 325. In addition, different revalorization rates were specifically fixed for various classes of monetary obligations; Wolff, p. 466.

Revalorization is a process by which the debt, not the currency, is revalued, and therefore whether it is permissible is a matter for the proper law to determine, since the *lex pecuniae* as such cannot vary the *quantum* of the obligation.¹ This was made clear by the Court of Appeal in *Anderson v. Equitable Assurance Society of the United States*.²

Revaloriza-
tion a
matter for
the proper
law

By a contract subject to English law H. took out a policy in 1887 with an American insurance company under which 60,000 marks became payable on his death to his widow. The premiums and the sum assured were expressed in German marks. The premiums due had all been paid by 1907. Upon his death in 1922, his widow claimed that the debt must be revalorized in accordance with German law.

The claim was disallowed. It was necessary to refer to German law, *qua* the *lex pecuniae*, in order to ascertain what German currency in 1922 represented 60,000 marks under the old currency. The reference stopped, however, at that point. It was not the function of the *lex pecuniae* to determine whether more than the normal amount of currency should be paid in discharge of the obligation. That was a question for English law, and since English law has no system of revalorization the widow was entitled to no more than the sterling equivalent in 1922 of 60,000 marks. In the words of Atkin L.J.:³

'It is the debt that is valorised and not the currency; and if that is so it is obvious that the German law cannot affect the operation of the rule of English law which is laid down in *Re Chesterman's Trusts*.'⁴

In the later case of *In re Schnapper*,⁵ Clauson J. treated the promise of the debtor as governed by German law⁶ and in consequence applied the principle of revalorization.

In these days of monetary instability, which began after the War of 1914, contracting parties frequently adopt a gold clause in an attempt to protect the creditor against a depreciation of currency.

Deprecia-
tion of
currency
avoidable
by a gold
clause

A gold clause may take either of two forms.

(a) A gold-coin clause, which is an agreement that a certain sum of money shall be paid in gold coins. This may not be an effective protection to the creditor, for it will be impossible for

Gold-coin
clause ✓

¹ Mann, op. cit., pp. 238 et seqq.; Wolff, p. 466.

² (1926), 134 L.T. 557.

³ At p. 566.

⁴ *Supra*, p. 260.

⁵ [1936] 1 All E.R. 322. See also *Kornatzki v. Oppenheimer*, [1937] 4 All E.R. 133.

⁶ For the ground upon which he did so see Mann, *The Legal Aspects of Money*, p. 242.

him to demand gold if a system of inconvertible paper money has been adopted in the country where performance is due.

Gold-value clause (b) A gold-value clause. This is an agreement, not to pay in gold coin or to deliver gold in specie, but to pay at the due date a sum equal to the then value of the gold coin specified.¹ For instance, it fixes the value of a loan at, say, £10,000, but provides that this shall be redeemed by the delivery of a quantity of paper or other money which would be equivalent to 10,000 gold coins of Great Britain of the standard weight and fineness existing at some specified date. Under such a provision the nominal amount of the loan is constant, but the amount of currency required for its repayment may vary. The clause specifies not a mode of payment, but a measure of liability.

Determination of the proper law The first task of a court which is required to consider an international contract containing a gold clause is to ascertain the proper law which governs the contract of loan. Whether the borrower is a sovereign State, a corporation or a private person, the proper law must be ascertained according to those rules and considerations that apply to a contract of any kind. The former judicial view, based upon the maxim that a sovereign is presumed to submit only to his own law, was that the proper law of a contract of loan negotiated by a State, whether in its own or in a foreign country, is necessarily the law of that State,² but it has now been held by the House of Lords that the sovereign nature of the borrower, though a factor of great weight, does not conclusively determine the governing law.³ Two factors of especial importance are the place where the loan is issued and the currency in which it is repayable.

Rex v. International Trustee A leading case on the subject is Rex v. International Trustee,⁴ where the facts were these:

Facts: In 1917 the British Government issued in America certain gold notes, convertible at the will of the holders into gold bonds, repayable at the option of holders either in New York or in London, and if in New York repayment to be made in gold coin of U.S.A. of the standard

¹ *New Brunswick Ry. Co. v. British and French Trust Corp.*, [1939] A.C. 1, at p. 39, per Lord Romer.

² *International Trustee for the Protection of Bondholders v. Rex*, [1936] 3 All E.R. 407, following dicta in *Smith v. Weguelin* (1869), L.R. 8 Eq. 198, 212-13, and *Goodwin v. Roberts* (1875), L.R. 10 Ex. 337, 494.

³ *Rex v. International Trustee*, [1937] A.C. 500. For a Swedish decision to the same effect see 18 *B.Y.B.I.L.* (1937), 215-21.

⁴ [1937] A.C. 500. See also *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122; 17 *B.Y.B.I.L.* (1936), 120-9; 18 *B.Y.B.I.L.* (1937), 212-21.

of weight and fineness existing on February 1st, 1917. The bonds were secured by a pledge agreement under which the borrowers deposited certain securities with an American company.

It was held, both by the court of first instance and by the Court of Appeal, that the contract between the British Government and a bond-holder was governed by English law, though presumably this finding was based solely upon the fact that one of the contracting powers was the Crown. The House of Lords came to the opposite conclusion. The circumstances attendant upon the issue of the loan demonstrated almost irresistibly that according to the presumed intention of the parties the contract was to be subject to the law of New York. The original notes were issued in America, they were expressed in terms of American currency, if repaid in America their value was to be estimated by reference to American coins, they were secured by a pledge agreement made and performed in America, and the bonds into which the notes were later converted were registrable and transferable only in New York.

The next task of the court is to construe the particular contract according to its proper law in order to determine the correct meaning of the gold clause. In other words, the question is whether it is a gold-coin clause or a gold-value clause, and in order to decide this the practice of the English courts is to consider the terms in which the contract is expressed and the surrounding circumstances that were present to the minds of the parties at the time of the loan.¹ No fixed rule can be laid down, but the view taken by the courts is that if the apparent object of the parties is to guard against currency fluctuations, the clause must be read as a value clause, unless there is clear language in the contract to the contrary. This was laid down in *Feist v. Société Intercommunale Belge d'Électricité*,² where the proper law of the contract was English.³ The facts were these:

How gold
clauses are
construed

In 1928 a Belgian company issued loan bonds which provided for the repayment of the capital and for repayment of interest 'in sterling

¹ *Rex v. International Trustee*, [1937] A.C. 500.

² [1934] A.C. 161; *Syndic in Bankruptcy of Khoury v. Khayat*, [1943] A.C. 507. If the proper law is not English, the court should follow the view adopted by the foreign proper law. This was not done by the House of Lords in *Rex v. International Trustee*, [1937] A.C. 500; 18 *B.T.B.I.L.* (1937), 219. According to Lord Russell of Killowen the 'Feist construction' has prevailed in most countries; *ibid.*, at p. 556. See Mann, *The Legal Aspect of Money*, pp. 101-3.

³ *Feist v. Société Intercommunale Belge d'Électricité*, [1934] A.C. 161; followed in *New Brunswick Ry. Co. v. British and French Trust Corp.*, [1939] A.C. 1.

gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928'. One of the terms provided that the bonds should be construed and the rights of the parties regulated according to the law of England as a contract made and to be performed in England.

Farwell J. and the Court of Appeal held that this clause determined, not the measure of the borrower's liability, but the mode in which the debt was dischargeable, i.e. by payment of gold coins, and that as at the date of the action bank-notes were legal tender in England, the lender must be satisfied with notes to the nominal value of the loan. According to this view the clause was intended by the parties to be a gold-coin clause. Lord Russell of Killowen, however, who delivered the unanimous judgment of the House of Lords, reached the opposite conclusion. He demonstrated that the parties could not have intended the words of the issue to bear their literal meaning, for at the time of the issue of the bonds bank-notes had been substituted for gold as legal tender and gold coin was substantially no longer in circulation. In his view the object of the clause was to guard against the departure of England from the gold standard. The clause referred, not to the mere mode of payment, but to the measure of the borrower's obligation.

'I think', he said, 'that the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness, not as being the mode in which the company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained.'¹

Tendency
to construe
contracts
as gold-
value
clauses

Thus in this case the words were construed to be a gold-value clause. In *New Brunswick Railway Co. v. British and French Trust Corporation*,² the railway company issued a series of bonds in 1884, each of which contained a promise to pay to the bearer

'the sum of £100 sterling gold coin of Great Britain of the present standard of weight and fineness at its agency in the City of London, England, with interest thereon at the rate of five pounds sterling *per centum per annum*'.

¹ At p. 172. In the somewhat surprising decision in *Treseder-Griffin v. Co-operative Insurance Society Ltd.*, [1956] 2 Q.B. 127, the Court of Appeal refused to uphold a gold-value clause which was contained in a purely domestic transaction—a long lease of shops in Cardiff. For a criticism of the decision, see 73 L.Q.R. 181 et seqq. (F. A. Mann).

² [1939] A.C. 1.

The construction put upon these words by the House of Lords was that the *Feist* construction applied to the payment of the bonds, but not to the payment of interest. The reference to gold contained in the contract was limited to the repayment of the principal sum. Its omission in the case of payment of interest, since it was presumably intentional, could not be disregarded by the court.

Having ascertained the meaning of the gold clause in question it remains for the court to decide whether it can be legally implemented according to the proper law, for repayment is performance, and performance is a matter of substance. Effect must be given to the state of that law, not at the time of the original loan, but at the time of repayment. The subject may be illustrated by reference to two cases that we have already considered, both concerned with gold-value clauses.

Proper law
of discharge
of obligation
governs
repayment

In *Feist's Case*,¹ where the obligation, governed by English law, was to repay the loan 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing' in 1928, the date of the loan, it was held that, though by 1932, the date of repayment, a later English statute had substituted paper for gold as the means of payment, and though the paper pound was of less value than the 1928 pound, yet the borrower must pay as many paper pounds as represented the gold value, according to the 1928 standard of weight and fineness, of the nominal sum due to the lender. The introduction of inconvertible paper money by the Gold Standard (Amendment) Act, 1931, did not invalidate the gold clause.

The same result would have been reached in *Rex v. International Trustee*² but for the fact that the currency legislation between the date of the loan and the term of repayment took a different course in America from what it did in England. The Joint Resolution of Congress had enacted that:

Every provision which purports to give a creditor a right to require payment in any amount in money of the United States measured by gold is contrary to public policy, and every obligation containing such a provision shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender.

There was no option, therefore, but to hold that, since the proper law of the contract was the law of New York, the obligation of the borrower was discharged by the payment in the existing American currency of the nominal amount of the bonds.

¹ *Supra*, p. 263.

² *Supra*, p. 262.

In *Rex v. International Trustee* the contract was subject to the law of New York and New York was the place of payment. But if the proper law and the law of the place of performance differ, which of these determines the effect of legislation invalidating gold clauses?¹ There can be little doubt that on principle the question is governed by the proper law, since it is one that affects, not the incidents and mode of performance, but the very substance of the obligation. As Wolff said, the statutory abolition of a gold clause alters 'the main content of the obligation; the debtor has to pay less than before, because he "owes" less than before'.² Yet in the *New Brunswick Railway Company Case*³ the Court of Appeal took the opposite view.⁴ In that case the Canadian legislature had passed the Gold Clauses Act, 1937, which in effect abrogated gold clauses. Although the Court of Appeal found the proper law to be the law of New Brunswick, it held that the Act did not invalidate the obligation of the debtor to pay the bonds in accordance with the terms of the gold-value clause. The general reasoning was based on the erroneous assumption⁵ that the *lex loci solutionis* governs any particular obligation which is performable in a country other than the country of the proper law.⁶ The House of Lords refused to determine the proper law and avoided the issue by holding that the Canadian Act had no retrospective effect. Unfortunately, however, Lord Romer expressed what is considered with respect to be the heretical opinion that in a contract which is governed by the law of one country but which provides for its performance in another country, a term is to be implied that such performance shall be 'regulated by' the *lex loci solutionis*.⁷ Unless a restrictive construction is placed upon the words 'regulated by', the effect of this dictum in many cases would be to remove the substance of the obligation from the control of its proper law.

Money of
payment

The final matter to be considered is the discharge of a money obligation.

Let us suppose once more that an English seller has agreed to sell goods to an Australian buyer for £500 and that the money of account, i.e. the contractual currency, is the Australian pound.

¹ Mann, *The Legal Aspect of Money*, op. cit., pp. 260-5; 6 *Vanderbilt Law Review*, 528-30.

² *Private International Law*, p. 478.

⁴ [1937] 4 All E.R. 516.

⁶ See especially at p. 526, *per Greer L.J.*, and at pp. 540 and 541, *per Scott L.J.*

³ *Supra*, p. 264.

⁵ *Supra*, pp. 244 et seqq.

⁷ [1939] A.C. 1, at pp. 43-44.

The amount of the debt, therefore, is five hundred Australian pounds and no more, despite the divergence in value between the English and Australian currencies. But this is not the end of currency problems, for the question now arises—What is the money of payment? In what currency must the debt, the value of which has been measured by reference to Australian currency, the money of account, be paid? This is not a question of what amount of coins or other currency the buyer must pay,¹ but in what currency he must tender the amount that he has agreed to pay.

This is a matter affecting the mode of performance that is determined by the *lex loci solutionis*,² and the rule is that the debt is dischargeable in the currency of the country where the debt is payable.³ If, therefore, in the hypothetical case given above the price of the goods sold is payable in Australia, the buyer is discharged by the tender of five hundred Australian pounds.

When, however, the money of account is the currency of one country and the debt is payable in another country, a problem of conversion arises. If the Australian buyer is contractually bound to pay the price in England, he discharges his obligation by the tender of English pounds,⁴ but, since the English and Australian pounds differ in value, he discharges the debt by tendering the sterling equivalent of five hundred Australian pounds. He will tender the quantity of sterling that suffices to purchase in a recognized and accessible market in England five hundred Australian pounds.⁵ The date at which the rate of exchange must be calculated is the date at which payment is due.⁶

¹ *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 148, *per* Lord Russell.

² *Supra*, p. 254.

³ *Auckland Corporation v. Alliance Assurance Co.*, [1937] A.C. 587; *Adelaide Electric Supply Co. v. Prudential Assurance Co.*, [1934] A.C. 122, 148, 151; *Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance Society*, [1938] A.C. 224, 240-1.

⁴ Presumably he may alternatively tender Australian pounds, *Marrache v. Ashton*, [1943] A.C. 311, 317, but if action is brought for the recovery of the money the English court can give judgment only in pounds sterling, *infra*, pp. 708-9.

⁵ *Marrache v. Ashton*, [1943] A.C. 311.

⁶ *Syndic in Bankruptcy of Khoury v. Khayat*, [1943] A.C. 507; *Cummings v. London Bullion Co.*, [1952] 1 K.B. 327.

CHAPTER IX

NEGOTIABLE INSTRUMENTS¹

1. Introductory. *Pages 268-9.*
2. Negotiability in England. *Pages 269-70.*
3. Formal validity. *Pages 270-2.*
4. Interpretation. *Pages 272-3.*
5. Presentment, protest and notice of dishonour. *Pages 273-6.*

1. *Introductory*

Negotiable
instru-
ments raise
frequent
conflicts

NEGOTIABLE instruments, since they represent the medium by which the trade of the modern world is conducted and financed, are a fertile source of problems that can be solved only by a reference to private international law. A bill of exchange drawn in England may be accepted in one foreign country, indorsed in another, and dishonoured in yet another; a foreign bill, exhibiting variations from its English counterpart, may circulate in the United Kingdom; and a bill that has been the subject of a series of purely foreign transactions may raise an issue in English litigation. Moreover, the English law of negotiable instruments differs considerably from that of other countries, and though there is no topic which more urgently requires a unification of the law throughout the world this is a goal which has yet to be reached. It was agreed by conventions made at Geneva in 1930: (a) to adopt a uniform law for bills of exchange and promissory notes; (b) to settle questions of private international law arising in connexion with bills and notes; and (c) to unify the rules concerning stamp duties.² The United Kingdom, however, has adopted only the last convention.³ What increases the difficulty of the present inquiry is that the Bills of Exchange Act, 1882, in a section which is often ambiguous and at times unintelligible, has codified the law on certain matters.

Variations
in the laws
of the world

Negotiable
instrument
contains
several
separate
contracts

A preliminary fact which should be appreciated, since it explains the rules for the choice of law adopted in England

¹ On this topic reference should be made to Falconbridge, *op. cit.*, pp. 316 et seqq.

² League of Nations Series II, C. 360, M. 151, 1930 II. For an article on (b) see Dr. H. C. Gutteridge in *The Journal of Comparative Legislation and International Law*, xvi. 53.

³ There are two conventions, one relating to cheques, the other to bills of exchange and promissory notes.

and indeed in most other countries, is that a negotiable instrument is a document that contains several distinct contracts.¹ Each party who puts his name to the document incurs a separate liability. In the case, for instance, of

a bill of exchange drawn by *A* on *B* to the order of *C* and indorsed by *C* in favour of *D*,

the original contract between *A* the drawer and *C* the payee is followed by what the Bills of Exchange Act calls 'supervening contracts' made by the acceptor and indorser. The principal debtor upon whom the primary liability rests is the acceptor, while the drawer and indorsers are his sureties for the performance of his contract.

Since the liability of the sureties is subsidiary to that of the primary debtor, it is arguable that when a conflict of laws occurs the position of each contracting party should be determined by a single law, namely, the law which governs the acceptance. This, however, is not the view taken by English law. The Act adopts the general principle that the liability of each separate contracting party is governed by the law of the place where each separate contract is made. There is no right in the parties to select their own proper law. The principle, subject to a few exceptions, is *locus regit actum*.

The various contracts are not governed by a single law

(2) *Negotiability in England.*

A question may arise whether a foreign document which is regarded as negotiable in the country of its origin is also negotiable for the purposes of its transfer in England. This question was neatly raised in *Pickers (v. London and County Banking Co.)*²

Status of foreign instruments

Facts: Certain Prussian bonds, which the Court of Appeal assumed to be negotiable by the law of Prussia, came into the possession of *X* after they had been stolen from the plaintiff. *X* deposited them with the defendants to secure his overdraft. In an action for their recovery, the defendants claimed a good title to the bonds, on the ground that they had taken delivery of them *bona fide* and for value.

This claim failed. A negotiable instrument no doubt constitutes cash in the eyes of English law and even if stolen its delivery passes a good title to a *bona fide* deliverer, but obviously nothing can pass as cash in this country unless it is part of the national currency.

¹ See especially Dicey, p. 841.

² (1887), 18 Q.B.D. 515.

'Is evidence', asked Bowen L.J., 'that an instrument or piece of money forms part of the mercantile currency of another country any evidence that it forms part of the mercantile currency of this country? Such a proposition is obviously absurd, for, if it were true, there could be no such thing as a national currency.'¹

The rule, therefore, is that foreign documents may be negotiable in England, but only if they are recognized as negotiable either by statute or by a custom of merchants in this country.

We will now deal with the rules for the choice of law that apply when a bill drawn in one country is accepted, indorsed or payable in another.

The question of what law governs the *transfer* of a negotiable instrument is discussed in a later chapter.²

3. *Formal validity of a bill and of the supervening contracts.*

Lex loci contractus governs

It is enacted that the formal validity of a bill, drawn in one country and accepted, negotiated or payable in another, shall be determined by the law of the place of issue, and that the formal validity of each supervening contract, such as acceptance, indorsement or acceptance *supra protest*, shall be determined by the law of the place where such contract is made.³

Meaning of 'place of issue'

The 'place of issue' does not necessarily coincide with the place where the bill is written out or signed by the drawer, for since 'issue' means the first delivery of a bill, complete in form, to a person who takes it as a holder,⁴ the place of issue is where the first delivery is made. If *X* signs a promissory note in Florence and posts it to the payee in London, the place of issue is London. Again, the place where each supervening contract is made is the place where that contract is completed by delivery.⁵

The *lex loci contractus* in the rigid sense indicated above, therefore, exclusively regulates formalities and determines, for instance, whether a bill is unconditional⁶ or whether an indorsement is made in due form.⁷ The formalities of the *lex loci contractus* are not merely sufficient but essential, and owing to the positive terms in which the section is drafted the general rule

¹ Ibid, at p. 520.

³ Bills of Exchange Act, 1882, s. 72 (1).

⁴ Ibid., s. 2.

⁵ *Chapman v. Cottrell* (1865), 34, L.J. Ex. 186.

⁶ *Guaranty Trust Co. of New York v. Hannay*, [1918] 1 K.B. 43 (bill drawn in America on English bank); the Court of Appeal, [1918] 2 K.B. 623, held, however, that the bill was unconditional both by English and by American law, and that the question which law applied did not arise.

⁷ *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889; *infra*, p. 505.

² *Infra*, pp. 501 et seqq.

that the formalities of the proper law are sufficient¹ cannot be extended to a bill of exchange.

The statute, however, raises two exceptions to the predominance of the *lex loci contractus*. Exceptions to rule

First, a bill issued out of the United Kingdom is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.² On the principle that claims based on foreign revenue laws will not be enforced,³ it has long been the rule that a contract made abroad is not void in England merely because it lacks the stamp required by the law of the place where it was made, unless, indeed, that law provides that an unstamped instrument shall be absolutely void.⁴ Having regard to the terms of the Act, however, it would seem that even in this last case a bill of exchange will not be invalid in England. (i) Foreign stamp laws

Secondly, a bill issued out of the United Kingdom which is formally valid according to the law of the United Kingdom, though not according to the law of the place of issue, is, for the purpose of *enforcing payment* thereof, *valid as between all persons who negotiate, hold or become parties to it in the United Kingdom*.⁵ The object of this exception, presumably, is to remove impediments from negotiability, for if the validity of a foreign bill depended upon its flawlessness by the law of the place of issue its negotiation in this country might be seriously affected. (ii) English dealings with foreign bills

If, for instance, a bill in the English form is drawn in France on an English drawee, indorsed in blank by the drawer in France, and later indorsed in England to the plaintiff, the acceptor cannot refuse payment merely because an indorsement in blank was void by French law at the time of its issue.⁶

It must be noticed, however, that the operation of the exception is restricted in two respects.

In the first place, a holder who relies upon the exception must prove that both he and the person against whom he seeks to enforce payment became parties to the bill in the United

¹ *Supra*, p. 237.

² S. 72 (1), proviso (a).

³ *Supra*, p. 136.

⁴ *Bristow v. Sequeville* (1850), 5 Exch. 275, 279; *James v. Gatherwood* (1823), 3 D. & R. 190. The two Geneva conventions mentioned above, p. 268, provide that no cheque, bill of exchange, or promissory note is to be absolutely void for want of a stamp, though it may be made unenforceable until stamped.

⁵ Bills of Exchange Act, 1882, s. 72 (1), proviso (b).

⁶ Cp. *In re Marseilles Extension Ry. & Land Co.* (1885), 30 Ch.D. 598, where, however, the bills were drawn before the Bills of Exchange Act came into force. The French law was altered in 1922.

Kingdom. In the example given above, for instance, the plaintiff would be unable to rely upon the exception as against the French drawer.

In the second place, the exception is limited to a suit in which the plaintiff seeks to enforce payment of the bill. It has been held, for instance, that an action brought by a holder for a declaration that he is not liable to repay the amount received by him from the acceptor is not an action for 'enforcing payment' within the meaning of the Statute.¹ The point, however, is not free from doubt.²

4. Interpretation.

The Bills of Exchange Act, 1882, provides that:

Lex loci contractus governs

The interpretation of the drawing, indorsement, acceptance or acceptance *supra protest* of a bill is determined by the law of the place where such contract is made.³

If, for example, a bill drawn in Poland and accepted in London is expressed to be payable in Holland, the question whether the acceptance is general or qualified is determinable by English law.⁴

Meaning of interpretation

The difficulty is to ascertain the sense in which the word 'interpretation' is employed by the Act. Normally interpretation indicates the process by which certain expressions are construed and their legal meaning determined, as occurs, for instance, where it is decided that the words written by an acceptor indicate a qualified acceptance. But unfortunately there is high judicial authority for the view that *interpretation* in the present section covers not merely questions of construction but also questions relating to the legal effect, i.e. to the essential validity, of the various contracts contained in a bill.⁵ If this is true it means that whether, say, an indorsement constitutes an effective transfer of a bill must in all cases be determined according to the law of the place where the indorsement

¹ *Guaranty Trust Co. of New York v. Hannay*, [1918] 1 K.B. 43, Bailhache J.; but see Scrutton L.J. in the Court of Appeal, [1918] 2 K.B. 623, 670, where the case was decided on a different ground.

² Falconbridge, op. cit., pp. 325-7.

³ S. 72 (2).

⁴ *Bank Polski v. Mulder & Co.*, [1942] 1 K.B. 497. Cp. *Sanders v. St. Helens Smelting Co.* (1906), 39 Nova Scotia L.R. 370, cited Byles on Bills, p. 310.

⁵ *Alcock v. Smith*, [1892] 1 Ch. 238, 256; *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, 683, 686; *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889, 899.

was completed. The subject of transfer, however, is a matter that will be discussed below.¹

The Act makes one exception to the exclusive sovereignty of the *lex loci contractus*. It provides that:

Inland bill indorsed abroad an exception to general rule

Where an *inland bill* is indorsed in a foreign country, the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.²

An *inland bill* is one which is both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident there. Any other bill is a foreign bill.³ This exception confirms the early decision of Lebel v. Tucker,⁴ where

1867.

Caults: a bill drawn, accepted and payable in England was transferred to the plaintiff in France by an indorsement which, though valid by English law, was insufficient by French law.

It was held that payment could be recovered from the acceptor. Payment must, therefore, be made to an indorsee of an inland bill if the indorsement is valid by English law, though void by the law of the place of indorsement; but in the case of a foreign bill payment is due on an indorsement valid at the place of indorsement, though void by English law. It must be observed that, since the provision is effective only 'as regards the payer', it does not apply to a dispute where two parties claim as holders of a bill indorsed abroad.⁵

5. Presentment, protest, and notice of dishonour.

When a bill is dishonoured, whether by non-acceptance or non-payment, a holder immediately gets a right of recourse against the drawer and the indorsers, but in order to enforce this right he is, as a general rule, required by English law to give due notice of dishonour to the drawer and to each indorser, and, in the case of a foreign bill, to cause it to be protested.⁶ With the exception of America, most foreign countries require the protest of a dishonoured bill.⁶ Protest is made by a notary public.

Internal law of England concerning dishonour

¹ *Infra*, pp. 501-8. For a most instructive account of the difficulty see Falconbridge, op. cit., pp. 327 et seqq.

² S. 72 (2), proviso.

³ S. 4. 'British Isles' means the United Kingdom of Great Britain and Northern Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them.

⁴ (1867), L.R. 3 Q.B. 77.

⁵ Byles on Bills, p. 312; citing *Alcock v. Smith*, [1892] 1 Ch. 238.

⁶ Byles on Bills, p. 241.

Private in-
ternational
law: Bills
of Ex-
change Act
72 (3)

The difficulty of finding the appropriate system of law to govern the problems that may arise upon the dishonour of a bill which has circulated in several countries is attacked by section 72 (3) of the Bills of Exchange Act. This runs as follows:

The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of protest or notice of dishonour are determined by the law of the place where the act is done or the bill is dishonoured.

Obscurity
of this
section

This obscure section verges perilously on the unintelligible. As Westlake observes, a reference to the place where an act, such as presentment or protest, is done scarcely meets the difficulty that arises from the act not having been done.¹ He suggests that the words 'or not done' must be interpolated. Dicey, on the other hand, would prefer to make the words read 'where the act is *to be done*'.² Again, the section refers to three events—presentment, protest and notice of dishonour—and then, on the question of choice of law, indicates two legal systems, the law of the place where the act is done and the law of the place where the bill is dishonoured. But how are these two systems to be distributed between the three events? Is, for instance, a question of presentment to be decided by the law of the place where the act is done, as Dicey argues,² or by the law of the place where the bill is dishonoured, as Westlake says?³

On prin-
ciple *lex*
loci solu-
tionis
applies

There is little doubt on the authorities, despite the obscurity of the Act, that the matters mentioned in the section, since they all concern the payment of a bill, come within the principle that the incidents and mode of performance are determinable by the law of the place of performance. Foote has stated the position with such perspicuity that we may be forgiven for quoting the passage *in extenso*.

"The drawer or indorser of a bill, who by the drawing or indorsement becomes the surety for the due performance of the acceptor's contract, knows, first, that the payment of the bill must be at the place where it is made payable. Secondly, he knows that the time of the payment, whether lengthened or not by days of grace, is to be determined by the law of the place where it is made payable; and when it is accepted generally, by the law of the place of acceptance. Now if the bill is not paid according to the law of the place of payment, when presented according to that law, he, the surety, will become liable to be called

¹ Westlake, p. 322.

² p. 860.

³ pp. 322-3.

upon to pay in place of the principal. Before, however, he can be so called upon, certain preliminaries, in addition to presentment and non-payment, must be fulfilled. It is at least reasonable to presume that these incidents of *non-payment* will be governed by the same law that applies to all the incidents of *payment*. It is the acceptor's contract that he guarantees, and he may fairly expect that the performance and the non-performance of that contract will be defined by the same law—the law of the place where it ought to be performed.¹

The decisions prior to the Act confirm this view that the governing system is the law of the place where the bill is payable.² Thus in Rothschild v. Currie:³

The authorities favour the *lex loci solutionis*

Fact:— A bill was drawn in England, accepted and made payable in Paris, and indorsed in London by the defendant (payee) to the plaintiff. The drawer, payee and indorsee were all resident in England. The bill was dishonoured upon being presented for payment. The plaintiff gave notice of this dishonour to the defendant. The notice was sufficient by French law, but too late according to English law.

The court held that the sufficiency of the notice must be determined by French law. The bill, though actually made in England, must be taken, as between the drawer and payee, said Lord Denman in delivering the judgment of the court, to have been made in France according to the maxim *contraxisse unusquisque in eo loco intellegitur in quo, ut solveret, se obligavit*. 'And if this be so as between the drawer and payee, it is equally true as between the indorser and the indorsee; the former of whom must be considered as the drawer of a new bill, payable at the same place, in favour of the indorsee.'⁴

This rule that the law of the place where a bill is payable exclusively governs the incidents of payment and non-payment holds good only where the person liable is bound to pay in that place. In a modern case:⁵

Bills drawn in Poland and accepted generally by the defendants in London were expressed to be payable in Amsterdam. They were not presented for payment in Amsterdam, but after their maturity payment was demanded of the defendants in London. Presentment was necessary

¹ Foote, pp. 460–1.

² *Rothschild v. Currie* (1841), 1 Q.B. 43; *Hirschfield v. Smith* (1866), L.R. 1 C.P. 340; *Horne v. Rouquette* (1878), 3 Q.B.D. 514.

³ *Supra*.

⁴ At p. 49.

⁵ *Banku Polskiego v. Mulder*, [1941] 2 K.B. 266. When this case was taken to the Court of Appeal, *sub nom. Bank Polski v. Mulder*, [1942] 1 K.B. 497, *supra*, p. 272, the point that the Dutch law of presentment applied was abandoned. See also *Cornelius v. Banque Franco-Serbe*, [1941] 2 All E.R. 728, 732.

by Dutch law, but, owing to the general acceptance, was unnecessary by English law.

The defendants argued that since payment was to take place in Holland the duty of the holder with regard to presentment was governed by Dutch law. Tucker J. held, however, that under section 72 (2)¹ the contract of acceptance was subject to English law, and that it was not one which according to English law compelled the acceptor to make payment in Holland. In the words of the learned judge:

‘Although the bills provide for presentment and payment in Holland, and payment in Holland is one of the methods by which the obligation of the acceptors can be performed, if, none the less, presentment in Holland does not take place, the acceptors according to English law still remain liable on the bills. These contracts, the proper law of which is admittedly English, are not contracts the performance of which by the acceptors must take place in a foreign country.’

Questions
concerning
date of pay-
ment

The Bills of Exchange Act² expressly refers the question of date of payment to the *lex loci solutionis*.

Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Thus if the law of that country postpones the maturity of a bill owing to war or to a state of emergency, payment cannot be enforced in England until the foreign moratorium is lifted.³

¹ *Supra*, p. 272.

² S. 72 (5).

³ *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525; *In re Francke and Rasch*, [1918] 1 Ch. 470.

CHAPTER X

TORTS

WHEN an action is brought in England upon a tort that has been committed abroad, the role of private international law is to specify the legal system according to which the rights and liabilities of the parties must be determined. The usual view is that either the *lex loci delicti commissi* or the *lex fori* must be chosen, or that these two laws must be combined. Possible choices of a governing law

To measure the rights and liabilities of the parties by the *lex fori*, despite the favour with which this solution was regarded by Savigny,¹ would lead to what Cockburn C.J. once stigmatized as 'the most inconvenient and startling consequences'.² The most startling and the most unjust would ensue if, in accordance with the *lex fori*, the defendant were held responsible for what would be an innocent act in the place where it was committed. If it were the general rule that the *lex fori* was the sole arbiter, the plaintiff would be free to choose a forum where the law was more favourable to him than in the place of wrong, provided that he could find one where the defendant happened to be present.³ (i) *Lex fori*

'The principle unanimously established by the canonists and later the statistes since the 13th century and generally adopted to-day is that the *lex loci delicti commissi* governs.'⁴ (ii) *lex loci delicti commissi*

If a plaintiff in English proceedings claims damages for a tort committed against him abroad, it certainly seems reasonable that the court should adopt the law of the place where the alleged infringement of his right occurred. Only in that way can the true character of his right and of the resultant obligation of the defendant be justly determined. It is that law to which the defendant owed obedience at the decisive moment, and it is by that law that his liability, if any, should be measured. Moreover, the normal person would naturally expect that whether

¹ *Private International Law*, Guthrie's translation, pp. 205-6.

² *Phillips v. Eyre* (1869), L.R. 4 Q.B. 225, 239.

³ Hancock, *Torts in the Conflict of Laws*, pp. 54 et seqq.

⁴ Rabel, vol. 2, p. 235. This principle seems to be adopted in, for instance, Austria, Belgium, Denmark, France, Germany, Greece, Holland, Hungary, Italy and Norway.

an act done by him is in fact wrongful is a matter for the law of its place of commission. The significance of territoriality is present to the minds of most people. It was considerations such as these that weighed with Holmes J. when he laid down his well-known *obligatio* theory. The learned judge said:

The *obligatio*
theory of
Holmes J.

'But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is, that although the act complained of was subject to no law having force in the *forum*, it gave rise to an obligation, an *obligatio* which, like other obligations, follows the person and may be enforced wherever the person may be found. *But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent.* It seems to us unjust to allow a plaintiff to come here absolutely depending upon the foreign law for the foundation of his case, and yet to deny to the defendant the benefit of whatever limitations on his liability that law would impose.'¹

This theory has not escaped criticism.² Nevertheless, it seems almost self-evident that the *lex loci delicti commissi* should be decisive and that the *lex fori* should apply only in so far as the recognition of an obligation as nearly equivalent as possible to that created by the foreign law would infringe its own doctrine of public policy or would conflict with its law of procedure. This view finds its simplest vindication in the fact that what has happened is 'of more acute concern to the foreign community than to the community of the forum'.³ In the words of Cardozo J.:

'The plaintiff owns something and we help him to get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid. . . . If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare.'

He was careful to add, however, that this reservation of public policy must be kept within due bounds:

¹ *Slater v. Mexican National Railway Co.* (1904), 194 U.S. 120; 24 Sup. Ct. 581. See also Holmes J. to the same effect in *Western Union v. Brown* (1914), 234 U.S. 542. Cheatham (3rd ed.), p. 534.

² Cook, *op. cit.*, pp. 36, 117; *Guinness v. Miller* (1923), p. 291 Fed. 768, 770, *per* Judge Learned Hand. *Koop v. Bebb* (1951), 84 Com. L.R. 629 (High Court of Australia); Morris, *Cases on Private International Law*, p. 280.

³ Hancock, *Torts in the Conflict of Laws*, p. 62.

'The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'¹

It is true that doubts have been expressed whether the *lex loci delicti* is the appropriate law to govern the conduct of the defendant notwithstanding the exceptional nature of the circumstances. If, for instance, an English motor-coach is making a foreign tour and while it is passing through France one of the passengers, all of whom are domiciled and ordinarily resident in England, assaults or defames another, it has been asked whether it is convenient or socially desirable that in an English action the matter should be governed by French law. It has therefore been suggested that a principle better calculated to solve every variety of case would emerge if the judges, adopting the more flexible approach to the subject that has succeeded so well in the case of contract, were to develop a doctrine of the proper law of a tort. (iii) The proper law of the tort

'If we adopt the proper law of a tort, we can at least choose the law which, on policy grounds, seems to have the most significant connexion with the chain of acts and circumstances in the particular situation before us.'²

In other words, it is arguable that a foreign tort should be adjudged according to the social environment in which it has been committed.³ In one case in the U.S.A., for instance, the employee of a New York firm, while on a temporary assignment to Saudi Arabia, was injured owing to the negligent driving by a fellow-servant of a truck belonging to the same firm. The judge appreciated that the intrinsic setting of this situation was American rather than Saudi Arabian and that the essential features of the case were most closely connected with New York, but, though he would have preferred to reach a decision on this footing, he felt bound by authority to apply the *lex loci delicti*.⁴

Interesting though this suggestion of a more flexible test may be, it has not as yet found favour either with English or Scottish judges. Doctrine of the proper law not accepted in England

¹ *Loucks v. Standard Oil Co. of New York* (1918), 224 N.Y. 99, per Cardozo J.

² 64 H.L.R. 888 (J. H. C. Morris).

³ 20 M.L.R. 460 et seqq. (J. A. Clarence Smith); Dicey, pp. 937-40.

⁴ *Walton v. American Arabian Oil Co.* (1956), 233 F. (2d) 941, cited Dicey, p. 939.

Thus, at a time when the Republic of Czechoslovakia was functioning in London, a Czech official wrote a letter to another Czech official which was alleged to be defamatory of a Czech diplomat then stationed in Cairo.

It would be difficult to find a set of facts in which the social, though not the geographical, environment was Czech rather than English, and yet in an action for libel brought by the diplomat the Court of Appeal held that, since every act had occurred in England, it was not entitled to apply a Czech rule which would regard the letter as absolutely privileged.¹

In another case a Scots engineer was injured during the course of his employment on a ship belonging to Scottish owners while she was lying in Dominican waters. Again, it would be no exaggeration to describe the environment as Scottish, but none the less the Court of Session held that the engineer's claim for damages must fail unless he could prove that it was actionable by Dominican law.²

Presumably, however, the court would feel constrained to apply the test of social environment or of the proper law in the case of a tort committed in some remote part of the world where the writ of a lawgiver does not run, as, for example, where an assault on a colleague is committed by a member of a scientific expedition to the South Pole. Indeed, it is only in such abnormal circumstances as these that the suggestion of recourse to the proper law seems to have any merit. Even where one Englishman assaults another in the course of a foreign coach tour, there is no obvious reason why the local law should be displaced.

The
English
doctrine

English law has not adopted any of these three possible tests. Instead, according to the prevalent view, it has so intimately blended the *lex loci delicti commissi* and the *lex fori* that the court is not the mere guardian of its own public policy, but is required to test the defendant's conduct by a reference to the English as well as to the foreign law of tort. The rule on the matter is very far from satisfactory.³ It is the result of the interpretation put by judges and jurists upon a certain passage in the judgment of Willes J. delivered over ninety years ago in 1870 · Phillips v. Eyre.⁴ The passage reads as follows:

¹ *Szalatnay-Stacho v. Fink*, [1947] K.B. 1.

² *Mackinnon v. Iberia Shipping Co.* (1955), S.L.T. 49; 2 Lloyd's Rep. 372.

³ This dual test is apparently applied in no other country outside the Commonwealth except China and Japan, Lorenzen, *Selected Articles on the Conflict of Laws*, p. 376.

⁴ (1870), L.R. 6 Q.B. 1, 28.

'As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled.

First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.'¹

These words were repeated by Lord Macnaghten in 1902.² They have been taken by later generations to mean that in every action brought in England upon a foreign tort the plaintiff must prove that the defendant offended the law both of the *locus delicti* and of England.

We will now consider separately the two conditions laid down by the learned judge.

(a) *Actionable in England.*

This first condition seems to mean that a plaintiff who seeks to recover damages in England for what is an admitted tort according to the *lex loci delicti commissi* will fail, unless he proves that had the defendant's act been done in England it would have constituted an actionable wrong by English domestic law. The only English case in which a plaintiff has been defeated by his failure to satisfy this condition is *The Halley*,³ where the question was one of vicarious, not direct, liability. It was decided two years before *Phillips v. Eyre*.

No liability unless wrong would have been actionable if committed in England

1868

Law Foreign shipowners sued the owners of a British steamer to recover compensation in respect of a collision caused by the negligent navigation of the steamer in Belgian waters. The defendants pleaded that at the time of the collision their steamer was under the charge of a pilot whom they were compelled by Belgian law to employ, and that they were not liable according to English internal law for the negligence of this compulsory pilot.⁴ The plaintiffs replied that by Belgian law an owner is liable for faulty navigation, even though due to the negligence of a compulsory pilot.

Judgment was given for the defendants by the Privy Council. Selwyn L.J., after pointing out that if any liability existed in the circumstances it must be the creature of Belgian law, asked, however, whether an English court was bound to apply that law in a case where, according to its own principles, no liability whatsoever existed. He repudiated the suggestion. He could find no adequate reason for the application of a foreign

Merits of the requirement questioned

¹ *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, 28.

² *Carr v. Francis Times & Co.*, [1902] A.C. 176, 182.

³ (1868), L.R. 2 P.C. 193.

⁴ This rule was altered by the Pilotage Act, 1913.

law to the prejudice of the subjects of other nations. He affirmed that it was contrary both to principle and authority to give a remedy for an act which constituted no wrong by English law. But it is pertinent to ask why a tenderness, which is withheld in other branches of the law, should be shown so generously to the defendant in a case of tort. It is, no doubt, prejudicial to an Englishman, who has made and lost a bet in Monte Carlo, that he should be liable for the amount due if sued in England. Yet his liability is clear.¹ An obligation arises from contract as well as from tort, and it is well established that a foreign contract is enforceable in England, notwithstanding that it is not actionable by English internal law.² It suffices that it is valid according to the foreign law. Why should the plaintiff to an action on a foreign tort be compelled to climb two hurdles instead of one?

Decision probably reflects a misplaced view of public policy

The most probable explanation of this strange decision was the necessity, in the opinion of the Privy Council, to enforce the policy of the English legislature as reflected in the Merchant Shipping Act, 1854.³ The policy of England with regard to compulsory pilotage had been expressly declared by the statute, and it would be tempting to conclude that it must not be sacrificed merely because a contrary policy prevailed in the *locus delicti*. If this is what convinced their Lordships, it is a further illustration of the fatal tendency to attribute extra-territorial effect to an English rule solely on the ground that it is contained in a statute.⁴

It is perhaps scarcely surprising that the decision should have been reached in 1868, for at that time the rules for the choice of law were to a considerable extent still immature and in many respects far different from what they have now become, as, indeed, is only too painfully apparent from certain passages in the judgment itself.⁵ What is surprising is that it should still be regarded with judicial equanimity, despite the greater awareness that now exists with regard to the underlying pur-

¹ *Supra*, pp. 238-9.

² *In re Bonacina*, [1912] 2 Ch. 394.

³ Hancock, *Torts in the Conflict of Laws*, p. 91; 39 *Transactions of the Grotius Society*, 50-53.

⁴ For a detailed criticism of this tendency see 39 *Transactions of the Grotius Society*, 39 et seqq. (Kahn-Freund). See *supra*, p. 242.

⁵ For example, Selwyn L.J. endorsed the view of Story that the English court may disregard a foreign judgment if it 'is based on domestic legislation not recognized in England or other foreign countries, or is founded on a misapprehension of what is the law of England', at p. 203. For the modern law see *infra*, pp. 661-7.

pose of private international law. It has been accepted without objection in other parts of the British Empire, where it seems particularly out of place. As Professor Hancock says:

'It seems incredible that because in 1868 the Privy Council refused to enforce a particular rule of Belgian law, the courts of Canadian provinces should refuse to enforce any law of a sister province which happens to differ slightly from their own. Yet this appears to be the prevailing doctrine in Canada today. One would look far to find a more striking example of "mechanical jurisprudence", blind adherence to a verbal formula without any regard for policies or consequences.'¹

A question that English judges have not yet had occasion to answer is whether a plaintiff who sues in respect of a foreign tort must show, not only that the conduct complained of would have been actionable had it occurred in England, but also that the *jus actionis* is vested in him personally by English law. This was part of the issue in the Scottish case of *M'Elroy v. M'Allister*,² where the facts were as follows:

Precise
meaning of
'actionable'
doubtful

McElroy, while travelling on a lorry, was killed at Shap, in England, as a result of the negligence of the driver. His widow, in her capacity as executrix, sued the driver in Scotland, taking advantage of the rule of English internal law that the cause of action of the deceased had survived to her. The rule of Scots internal law, however, is that the right of action of an injured person dies with him.

On the assumption that *Phillips v. Eyre* is accepted by Scots law, it was necessary for the plaintiff to show that the defendant's negligence would have satisfied the first condition laid down by Willes J. had the facts occurred in Scotland. The Court of Session, by a majority, dismissed the claim on the ground that according to Scots law the negligence of the driver was not actionable at the suit of the widow, notwithstanding that it was actionable in the abstract. According to this interpretation of *Phillips v. Eyre*, damages will not be recoverable in the forum for conduct which in the abstract is actionable both by the *lex loci commissi* and by the *lex fori*, unless the person to whom the compensation is payable is identical in both laws. The *lex fori* dictates to the *lex loci delicti commissi* who the appropriate beneficiary should be. In most other countries the more enlightened view prevails that the law of the place of wrong is decisive on the matter. Lord Keith, in a dissenting judgment, pointed out that Willes J. spoke *obiter* when he formulated the first

¹ Op. cit., p. 89.

² [1949] S.C. 110; 12 M.L.R. 248-52; 27 *Canadian Bar Review*, 816 et seqq.

condition in *Phillips v. Eyre* and that he went further than was warranted by the decision in *The Halley*, the only authority upon which he could have relied. The emphasis should be on the wrongfulness of the defendant's conduct, not upon its actionability. In *The Halley*, no wrong whatsoever had been committed in the eyes of the English *lex fori*; in the instant case, the negligence of the driver was wrongful according to the Scottish *lex fori*.

(b) *Not justifiable by the 'lex loci delicti commissi'.*

What is
the correct
role of the
*lex loci
delicti
commissi*?

If a plaintiff who sues on a foreign tort in England must show that the wrong of the defendant would have been actionable had it been committed in England, it is only natural to assume that in addition he must show that it was in fact actionable by the law of the place where in reality it was committed. It is inconceivable that the *lex loci delicti commissi* should be allowed to play a less decisive part than the *lex fori* in the determination of the defendant's liability. This obvious truism was recognized by the Privy Council in *The Halley*,¹ where Selwyn L.J. said that there is no objection to an action in England for injuries committed abroad, provided that 'such injuries are actionable both by the law of England and also by that of the country where they are committed'.² Yet, two years later, in *Phillips v. Eyre*,³ Willes J. when stating the function of the *lex loci delicti commissi* used language which at first sight seems a little obscure. He referred to the matter in two passages. According to the first, the *lex loci delicti commissi* must say whether the act of the defendant was 'valid and unquestionable', according to the second, whether it was 'justifiable'. It is the latter of these epithets that has been preferred by later judges. Thus in 1902 Lord Macnaghten repeated the words of Willes J. and said:

'The act must not have been justifiable by the law of the place where it was committed.'⁴

Defen-
dant's act
must not
have been
'justifiable'
by the *lex
loci delicti
commissi*

'Justifiable' is a strange word to use in connexion with conduct that has caused injury to another, for to justify an act means to show the justice of the act. No doubt it was sufficiently apt to describe the position of the defendant in the circumstances which confronted Willes J. in *Phillips v. Eyre*:⁵

¹ (1868), L.R. 2 P.C. 193.

³ (1870), L.R. 6 Q.B. 1.

⁴ *Carr v. Francis Times & Co.*, [1902] A.C. 176, at p. 182.

⁵ (1870), L.R. 6 Q.B. 1.

² *Ibid.*, at p. 203.

An action was brought in England against the defendant, an ex-Governor of Jamaica, for having assaulted and imprisoned the plaintiff during a rebellion in the island. Judgment was given for the defendant on the ground that his conduct, though originally illegal by Jamaican law, had later been excused by an Act of Indemnity passed by the local legislature.

This was a case in which the legislature took the view that the defendant was justified by the circumstances in acting as he had done, and, as Lord Mansfield said in an earlier case, 'Whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.'¹ But it does not follow that because a word is appropriate to a particular kind of case it should be used when laying down the broad doctrine applicable to torts in general.

The object of these remarks is not to quibble over a word. It is a matter of complete indifference whether the word 'justifiable' is used in the present connexion, and no one could reasonably cavil at its use provided always, however, that it is not given some strained and exotic meaning and thereby allowed to support an undesirable decision. 'Actionable' is an intelligible word in common use, but 'justifiable' is ambiguous, and the danger is that it may be interpreted in such a way as to warrant the grant of a remedy in England when none is obtainable in the place of wrong. To go thus far is indefensible. The right of a plaintiff to obtain damages in England for a foreign tort may be restricted within the limits of the English doctrine of public policy, but that it should be more ample than that afforded by the *lex loci delicti commissi* verges on the ridiculous. It is contrary to reason that by the chance place of the forum, by the luck of the draw, as it might be said, a plaintiff should obtain a remedy denied to him in the country where he suffered the injury. It is elementary common sense that he should not be free to better his position at the expense of the defendant by the selection of a congenial forum.

Objections
to the
word
'justifiable'

Suppose, for instance, that the defendant has lightly struck the plaintiff in a foreign country, the law of which denies a right to damages for a trivial assault, though it permits the institution of penal proceedings. Can the plaintiff take advantage of the common law and recover substantial damages in England?

This question, though not necessary to the decision, was considered by the Exchequer Chamber in *Scott v. Seymour*.²

¹ *Mostyn v. Fabrigas* (1774), 1 Cowp. 161. ² (1862), 1 H. & C. 219.

Wightman J. was of opinion that if both litigants were British subjects the action would lie; Williams J. was not prepared to agree; Crompton J. regarded the problem as 'a matter of some difficulty and doubt'; Blackburn J., though denying that the nationality of the parties was relevant, inclined to agree with Wightman J. This heretical suggestion was translated into practice by the Court of Appeal in *Machado v. Fontes*.¹ 1897.

The objections illustrated by *Machado v. Fontes*

In that case the plaintiff sued the defendant in England for a libel which had been published in Brazil. Defendant pleaded that by Brazilian law no civil action lay for the recovery of damages in respect of such a libel, though he might be criminally prosecuted at the suit of the State. This plea was supported by the argument that, since the libel was not actionable in Brazil, it was not actionable in England.

The Court of Appeal held that the plea was bad and that it must be struck out. Lopes L.J. was content to rest upon the reasoning that if an act was criminal it was not innocent and therefore not justifiable in the country where it was done. Rigby L.J. agreed. He considered that the change of language from 'actionable' to 'justifiable' in *Phillips v. Eyre* was deliberate. In his view the nature and extent of the remedy in the foreign country was a matter of no importance, for everything must depend upon the innocence of the act. He said:

"The innocence of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done."²

Machado v. Fontes criticized

Machado v. Fontes has been commended,³ reprobated,⁴ reconciled with doctrine,⁵ explained,⁶ doubted,⁷ followed by some courts,⁸ repudiated by others.⁹ It is submitted that the decision

¹ [1897] 2 Q.B. 231.

² At p. 235.

³ Lorenzen, 47 L.Q.R. 485-7; Gutteridge, 6 Cambridge L.J. 20; Pollock, 13 L.Q.R. 233, though he considered it illogical.

⁴ Hancock, 22 Canadian Bar Review, 853; Martin Wolff, p. 497; Beale, 1922-3.

⁵ Schmithoff, *English Conflict of Laws*, pp. 148-51; 5 I. & C.L.Q. 466-71.

⁶ Hancock, *Torts in the Conflict of Laws*, p. 17. See also W. A. Steiner in 9 M.L.R. 188-9.

⁷ Falconbridge, 23 Canadian Bar Review, 315.

⁸ *McLean v. Pettigrew*, [1945] S.C.R. 62 (Canada).

⁹ *Lieff v. Palmer*, [1937] 63 Que. K.B. 278 (Canada). In *Naftalin v. L.M.S.*, [1933] S.C. 259, it was repudiated in no uncertain terms by the Court of Session. The plaintiff's son was fatally injured at Leighton Buzzard, owing to the admitted negligence of the defendants, while travelling from London to Glasgow with the return half of a ticket bought in Glasgow. The plaintiff claimed damages by way of *solatium*. Such damages are allowed by Scottish, but not by English,

is regrettable. It is at glaring variance with the rule of natural justice that the plaintiff should not reap an extra benefit by selecting a forum where the remedy is more favourable than in the place of wrong.¹ It replaces the word 'justifiable' used in the principal case, *Phillips v. Eyre*, by a word even more comprehensive and more ambiguous. It unreasonably enlarges the content of the substantive right given to the plaintiff by the law of the country where the right arose. It ousts the *lex loci delicti commissi* from its rightful role, which is *inter alia* to specify the legal consequences that flow from the defendant's act. In short, it virtually submits the existence, the nature and the quantum of the obligation to the mercy of the *lex fori*.² Thus, for instance, in *Machado v. Fontes*, itself, it deprived the defendant of a defence that would have been available to him by the *lex loci delicti commissi*; and carried to its logical conclusion it would enable a defendant to rely upon a defence available to him by the *lex fori* though denied to him by the *lex loci delicti commissi*. Again, it would appear to leave the question of remoteness of damage to the *lex fori*,³ thus raising an illogical exception to the rule that obtains in contract.⁴ It has even been used to condone the view that what is neither a tort nor a crime in the foreign country may be treated as a tort in England. Thus in *McLean v. Pettigrew*,⁵ decided by the Supreme Court of Canada:

The plaintiff, while travelling in Ontario as a gratuitous passenger in the defendant's car, was injured in an accident in which the car was involved. By the law of Ontario the plaintiff, being a gratuitous passenger, was not entitled to recover damages in a civil action. The defendant was prosecuted in Ontario for driving without due care and attention in contravention of a local statute which imposed penalties for the offence if proved, but he was acquitted.

The plaintiff, in an action brought in Quebec, was held entitled to recover damages for the injuries caused to him on the ground that, since in the opinion of the court the defendant was guilty

law. It was held that the governing law was English law as being the *lex loci delicti commissi*; that the right to claim *solatium* was a substantive right, not a mere matter of procedure; and that therefore the claim must fail. This decision was followed in *M'Elroy v. M'Allister*, [1949] S.C. 110 and in *Mackinnon v. Iberia Shipping Co. Ltd.*, [1954] 1 LL. L. Rep. 275; 3 I. & C.L.Q. 693.

¹ 22 *Canadian Bar Review*, 853.

² Falconbridge, op. cit., pp. 818-20.

³ 3 I. & C.L.Q. 651 et seqq. (J. A. C. Thomas).

⁴ *Infra*, pp. 701-8.

⁵ [1945] S.C.R. 62. See Falconbridge, pp. 694-702.

of careless driving, his act was not innocent. Such a surprising decision might not have been given by an English court, but it at least illustrates what inelegant results may be reached unless 'not justifiable' is equated with 'actionable'.

Extent to which defendant can rely on *lex loci delicti commissi* If *Machado v. Fontes* is to be taken as representing the modern law, it must be said that an act committed abroad is justifiable unless it is either tortious or criminal by the *lex loci delicti commissi*. If, on the other hand, the decision is ultimately repudiated, the reasonable principle will then obtain that the defendant is not liable in England to pay damages for a foreign tort unless he has committed an actionable wrong according to the *lex loci delicti commissi*.¹ Whatever view of the decision may ultimately be taken by the courts, it is at any rate clearly established that an action will not be sustainable in England for an act which, according to the *lex loci delicti commissi*,

- (a) creates no liability whatsoever; or
- (b) is one for which the defendant has a valid defence; or
- (c) is one which has been legalized by some competent authority; or
- (d) is one which does not create a liability in tort for damages.

(a) No liability by *lex loci* If the act of the defendant creates no liability whatsoever according to the law of the place where it was committed, there is no liability that can be enforced in England. This will be the case, for instance, if an act such as enticing away a wife or a servant, which is tortious by English law, is not regarded as wrongful in the foreign country.² Thus in *The Mary Moxham*:³

It was successfully pleaded to an action brought against the owners of an English ship, which had damaged a pier in Spain, that by Spanish law the master and mariners were alone liable, to the exclusion of the owners, for negligent navigation.

¹ In *Koop v. Bebb* (1951), 84 Com. L.R. 629; Morris, *Cases on Private International Law*, the High Court of Australia concluded its review of *Machado v. Fontes* with these words: 'It seems clear that the last word has not been said on the subject, and it may be the true view that an act done in another country should be held to be an actionable wrong in Victoria if, first it was of such a character that it would have been actionable if it had been committed in Victoria, and secondly, it was such as to give rise to a civil liability by the law of the place where it was done. [Italics supplied.] Such a rule would appear to be consonant with all the English decisions before *Machado v. Fontes* and with the later Privy Council decisions.' See, for example, *Canadian Pacific Railway v. Parent*, [1917] A.C. 195, 205.

² Schmitthoff, *English Conflict of Laws* (3rd ed.), p. 154.

³ (1876), 1 P.D. 107.

A defence available to the defendant under the *lex loci delicti commissi* is equally available to him in English proceedings. In *McMillan v. Canadian Northern Railway*:¹

(b) Valid defence according to *lex loci*

① *facts*: A fireman, in the course of his employment by the respondents, was injured in Ontario owing to the negligence of a fellow servant. He sued in Saskatchewan for the recovery of damages. The defence of common employment is recognized in Ontario but not in Saskatchewan.

Apart from other considerations affecting this case, which are discussed below,² it is clear that the appellant could be successfully met in the Saskatchewan action by the defence of common employment.

If the wrongful conduct of the defendant is later excused by a competent authority in the country where he acted, as, for example, when an Act of Indemnity is passed by the local legislature, he has a complete defence to proceedings brought against him in England. This was decided in *Carr v. Francis Times & Co.*,³ and also, as we have seen, in *Phillips v. Eyre*.⁴ The latter was a strong case, since the defendant, in his capacity as Governor, was a necessary party to the legislation upon which he based his defence.

(c) Defendant's act legalized by *lex loci*

An English court will not hold a defendant liable for an act which the *lex loci delicti commissi* does not regard as creating a liability enforceable in the courts. By that law the plaintiff may indeed be entitled to recover compensation from the defendant, but in order to succeed in England he must prove that he is entitled to sue for damages in respect of a wrongful act. This appears to be the effect of the Privy Council decisions in *Walpole v. Canadian Northern Railway*,⁵ and *McMillan v. Canadian Northern Railway*.⁶ The facts of the latter have already been partly given.⁷ There was, however, this further obstacle in the way of the appellant's success.

(d) No actionable claim by *lex loci*

② *facts*: The Workmen's Compensation Act of Ontario, after providing that an employer should be liable individually to pay compensation at a fixed scale to any workman injured in the course of his employment, directed that no action should lie for the recovery of the compensation, but that all claims should be determined by a Board specially established for the purpose.

In a case of this description, when action is brought in a foreign country the first question that requires consideration is one of

¹ [1923] A.C. 120.

² *Infra*

³ [1902] A.C. 176.

⁴ *Supra*, pp. 284-5.

⁵ [1923] A.C. 113.

⁶ [1923] A.C. 120.

⁷ *Supra*.

classification. Is the claim based upon a tort or not? The court of the forum must examine the provisions of the statute in question and must decide whether they are of such a nature as to create a right founded in tort.¹ The Privy Council in *Walpole's Case* addressed its mind to this question and decided that the claim of the plaintiff arose, not *ex delicto*, but *ex lege*. In the words of Lord Cave:

'No action for the negligence in question could have been brought in Ontario apart from the statute; and the claim given by the statute is not a claim for damages for tort, but a claim (strictly limited in amount) for compensation for the accident.'

The claim, therefore, quite apart from the defence of common employment, was not sustainable in Saskatchewan, since the accident gave rise neither to a cause of action nor to criminal proceedings in the country of its occurrence.

Judgment
of Willes J.
has been
misunder-
stood

Such, then, is the interpretation that has been placed upon the words of Willes J. in *Phillips v. Eyre*: proceedings in England on a foreign tort will fail unless the conduct of the defendant was civilly or criminally unjustifiable in the *locus delicti* and unless it would have constituted a tort in the eyes of English law. If this is the meaning that the words were intended to bear, that very learned judge is indeed open to the charge that he introduced into the law of England what an American critic has stigmatized as 'a monstrous criterion for suits on foreign torts, comparatively backward, impractical, inherently inconsistent and imprecise, and incompatible with the liberal principles at the same time in England applied to other types of obligation'.² This same critic, however, argues with force that judges and jurists, especially Dicey, have misconstrued the words by disregarding their context.³ The crucial passage in the judgment, which precedes the statement of the two rules, is that in which Willes J. is at pains to stress 'the true character of a civil or legal obligation and the corresponding right of action'. It runs as follows:

'The obligation is the principal to which a right of action *in whatever court*⁴ is only an accessory, and such accessory, according to the maxim

¹ *B.T.B.I.L.* 62, note 2.

² Professor Yntema in 27 *Canadian Bar Review*, 121. See also 27 *Canadian Bar Review*, 666; Falconbridge, *op. cit.*, pp. 809 et seqq.

³ 27 *Canadian Bar Review*, 118 et seqq.; and also 4 *I.L.Q.* 7-10, where the argument is repeated.

⁴ Italics supplied.

of law, follows the principal and must stand or fall therewith. *Quae accessorium locum obtinent extinguuntur cum principales res peremptae sunt*. A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. . . . The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.¹

After this insistence upon the decisive role played by the *lex loci*, after insisting that the character of tortious liability must be determined by the law of the place where it is born, it would scarcely be consistent, to say the least, to sanction a fundamental alteration of its character at the instance of the law of the forum where it was not born. Willes J. was the last judge to be accused of inconsistency, and there must be some explanation of his later statement concerning actionability in England. It is, therefore, significant that, after thus stressing the primacy of the *lex loci delicti commissi*, he was careful to add the warning that 'there are restrictions in respect of locality which exclude some causes of action altogether' from being tried in England, such as an action for trespass to foreign land,² whereupon he immediately proceeded to formulate the double rule set out above on page 281. This reference to local restrictions lends great weight to Professor Yntema's suggestion that the judge in formulating the first limb of his double rule had in mind the question of jurisdiction and used the word 'actionable' in its primary sense as 'cognizable or triable', not as referring to substantive liability.

What he
meant by
the first
condition

'Is it reasonable to construe this as more than a statement of a threshold requirement that a suit on a foreign "wrong" must be such as to be triable in England, e.g. not an action for trespass to foreign land nor one excluded on principles of policy found for instance in the general maritime law as declared by Parliament (*The Halley*)?'³

It seems reasonably clear also that the word 'justifiable' was used by Willes J. to emphasize the established and obvious rule that what is a good defence in the *locus delicti* must be equally good in a foreign forum. His mind was addressed solely to 'the civil liability arising out of wrong', and there is nothing in his remarks to show that he contemplated the possibility of a successful action in England in respect of an act which is civilly, though not criminally, innocent in the *locus delicti*.

What he
meant by
the second
condition

¹ *Phillips v. Eyre* (1870), L.R. 6 Q.B. at p. 28.

² *Infra*, pp. 595 et seqq.

³ 27 *Canadian Bar Review*, 118-19.

The opportunity is still open to the House of Lords to rescue English law from an unfortunate doctrine that is alien to its spirit.

What is the
locus
delicti?

Since in every action on a foreign tort reference must be made to the law of the place where the tort was committed, it is necessary to have some test by which in a case of doubt the identity of that place may be determined. In the normal case, when the facts and events that are said to constitute the tort have all occurred in one country, there is, of course, no difficulty. But a more complicated situation arises when the facts occur some in one country, some in another.

If *A* negligently lights a fire on the English side of the Scottish border, and the fire spreads into Scotland where it there burns down *B*'s house, has the tort been committed in England or in Scotland?

Theories
that have
been
proposed

The importance of deciding this is evident, since the two laws may differ fundamentally upon the question of *A*'s liability. Three different tests have been proposed for the determination of the matter.¹

First, the place where the defendant did the act from which the harm ensues constitutes the *locus delicti*. Many arguments have been advanced in favour of this solution.²

The second theory prefers the country in which the harm ensues. This represents the American doctrine.³ Thus Beale says that 'the place of wrong is the place where the person or thing harmed is situated at the time of the wrong',⁴ though the Restatement states it in more accurate language. 'The place of wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place.'⁵ Cook is of opinion that the theory has been adopted without an adequate discussion of the issues involved.⁶

According to the third theory, adopted by the German Supreme Court⁷ and favoured by Cook,⁸ the place of wrong is the place in which the law is most favourable to the person wronged. The plaintiff can, at will, fix the *locus delicti* in any country in which any of the operative facts occurred.

¹ Wolff, pp. 493 et seqq.; 47 *L.Q.R.* 491 et seqq.

² They are summarized by Lorenzen in 47 *L.Q.R.* 493.

³ *Otey v. Midland Valley R.R. Co.* (1901), 108 Kan. 755; Beale, *Cases on the Conflict of Laws*, ii. 514.

⁴ *The Conflict of Laws*, ii. 1287.

⁵ *Legal and Logical Bases of Conflict of Laws*, p. 319.

⁷ 47 *L.Q.R.* 491-3; Wolff, p. 493.

⁸ *Op. cit.*, p. 345.

⁵ S. 377.

The chief English authority in which the question has been considered is *Monro (George) Ltd. v. American Cyanamid and Chemical Corporation*.¹

The theory expressed by the Court of Appeal

Facts: The plaintiffs alleged that the defendants were liable in negligence for selling a substance to them in New York without giving a warning of its dangerous qualities. The substance having been shipped to England, the plaintiffs became liable in damages to a farmer in England who had suffered injury by its use upon his farm.

The question to be decided by the Court of Appeal was whether leave should be granted to the plaintiffs, under Order 11, Rule 1 (ee) of the Rules of the Supreme Court,² to serve notice of the writ upon the defendants in New York. This depended *inter alia* upon whether the action was founded on a tort committed in England. It was held that in any event the affidavit put in by the plaintiffs was so defective that this was not a case where the court, in its discretion, should permit service in New York. The identification of the *locus delicti*, therefore, was not strictly necessary, but nevertheless two of the Lords Justices expressed their opinions upon the matter and subscribed in effect to the first theory given above—the theory of the place of acting. Du Parcq L.J. said that the question to be asked in connexion with Order 11 was: ‘Where was the wrongful act, from which the damage flows, in fact done? The question is not where was the damage suffered, even though damage may be the gist of the action.’³ Goddard L.J., however, attempted a deeper analysis of the problem. He said:

‘I find it of some assistance in coming to a conclusion in this case to analyse in my own mind what exactly is the cause of action and the right of action, which are two different things. The action is one of that class which is known as an action on the case, akin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage to the plaintiff. Here the alleged tort which was committed was a wrongful act or default. It was the sale of what was said to be a dangerous article without warning as to its nature. That act was committed in America, not in this country.’⁴

It is submitted with respect that there is no such distinction. ‘Cause of action’, in the words of Parke B., ‘means all those things necessary to give a right of action.’⁵ It is the entire set

¹ [1944] 1 K.B. 432.

³ At p. 441.

⁵ *Hernaman v. Smith* (1855), 10 Ex. 655, 666.

² *Supra*, p. 116.

⁴ At p. 439.

of facts that gives rise to an enforceable claim—every fact which, if traversed, the plaintiff must prove in order to obtain judgment.¹ A person has no right of action unless he has a cause of action, but if he has a cause of action there is nothing that impedes his right to bring the action, except, of course, some extraneous fact such as lapse of time under the Limitation Act. Since 'cause of action' comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment, nothing less than the sum total of these facts can be described as a 'wrongful act'. In the instant case the tort alleged was negligence. To succeed in such a case the plaintiff must prove duty, breach and damage. Once he proves these, and not before, the act of the defendant becomes a wrongful act, and therefore it constitutes a cause of action which in turn produces a right of action.

It would seem, then, that the place where a so-called wrongful act or default is committed is not necessarily the *locus delicti*. It is presumably a wrongful act to slander a man, or to construct a trap for a wayfarer, or to sell a dangerous substance without warning, but none of these acts without more constitutes a tort and so it is premature to refer to any *locus delicti*. A tort must be committed before it can be said where it was committed.

Suggested
test An analysis of the task that confronts the court when dealing with a foreign tort may help to solve the problem. The court is required to ascertain the *locus delicti*, since the action will not lie unless the act of the defendant is unjustifiable by the law of that place. It is also required to determine whether the conduct of the defendant is actionable according to English domestic law. Therefore, in considering where the wrong has been committed, a wrong which must of necessity be one that is actionable by English law, the court cannot very well do otherwise than apply the principles of English law. According to these principles, no act or default is tortious until all the things necessary to give the plaintiff a cause of action have occurred. If of three facts necessary to give a cause of action only two have occurred, there is a tort in embryo, but not a complete tort. The third fact has still to occur, and it would seem that the place in which its occurrence completes the tort constitutes the *locus delicti*. By reason of something that has happened in this place it is possible to say for the first time that a tort has been committed. It is submitted, therefore, that the *locus delicti*

¹ So defined in Stroud's Dictionary, *sub nom.* 'Cause of Action', citing Lord Esher in *Read v. Brown* (1888), 22 Q.B.D. 128.

is the first place where the sequence of events is complete so as to create a cause of action. Or, to repeat the American Restatement: 'The place of wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place.'¹ What that last event is must be decided by the *lex fori*.

If this view is correct, it conflicts with those expressed by the two Lords Justices in the *Monro Case*.²

In the later case of *Bata v. Bata*,³ where defamatory letters had been written by the defendant in Zürich and posted to certain addresses in London, it was argued on the basis of the *Monro Case* that the tort had been committed in Switzerland where the letters had been written and that therefore leave to serve the defendant out of the jurisdiction should not be granted. The Court of Appeal, however, held that publication is the material element that completes the tort of libel and that the cause of action had arisen in England.

It only remains to notice that the English court, when it refers to the *lex loci delicti commissi*, merely applies the rules of that law that would be applicable to a purely domestic case similar to the one under consideration.⁴ In other words, the reference is to the internal law of the *locus delicti*, not to its private international law. Reference to *lex loci* is to its domestic rules

22. The law that governs maritime torts depends upon whether they have been committed within the territorial waters of some State or upon the high seas.⁵ Maritime torts (i)

In the former case the ordinary doctrine as laid down in *Phillips v. Eyre* applies. The tort is treated as having been committed within the jurisdiction of the country possessing sovereignty over the waters.⁶ Torts in foreign waters

The High Court has jurisdiction to entertain a suit in respect of injurious acts done on the high seas,⁷ even though both the litigants are foreigners.⁸ It is a little difficult, however, to specify Torts on (ii) the high seas

¹ S. 377. This is now being reconsidered.

² *Supra*, p. 293.

³ [1948] W.N. 366; 92 Sol. Jo. 574.

⁴ Cook, *Logical and Legal Bases of Conflict of Laws*, p. 329; Falconbridge, 23 *Canadian Bar Review*, 312. But see Griswold, 51 *H.L.R.* 1205.

⁵ On maritime torts see 3 *I. & C.L.Q.* 115 et seqq. (D. Winter).

⁶ *The Arum*, [1921] P. 12. So also in Scotland, *MacKinnon v. Iberia Shipping Co. Ltd.* (1955), S.L.T. 49; 33 *B.Y.B.I.L.* 342-3.

⁷ *The Tubantia*, [1924] P. 78.

⁸ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. at pp. 536-7.

with absolute certainty the law which the court will follow in determining the rights and liabilities of the parties.

Confined
to one ship

It seems clear, in the first place, that the law of the flag is the decisive factor wherever the acts complained of have all occurred on board a single vessel, for a ship is regarded for certain purposes as a floating island over which the national law prevails.¹ If, therefore, the tort is committed on board an English vessel, English law will alone apply, but if it is committed wholly upon a foreign ship and an action is brought in England, the plaintiff, if the analogy of wrongs done in a foreign country is followed, will have to prove that the act is unjustifiable by the law of the flag and is also actionable by English law. Where a flag is common to a political unit containing several different systems of law, as in the case of the British Commonwealth or the U.S.A., the law of the flag means the law of the port at which the ship is registered.²

External to
a ship

It is scarcely possible, however, that the law of the flag should govern all wrongs committed on the high seas.

Suppose that the act giving rise to the dispute is external to the foreign ship in the sense that it has affected persons or property not on board, as, for example, where it is negligent navigation leading to a collision or to the destruction of a submarine cable. Is such an act on all fours from the point of view of choice of law with an act, such as an assault, which took place entirely on the ship?

Before we can answer this question we must ascertain the law by which the liability for what may be called acts external to a foreign ship are determined.

Collisions
tested by
general
maritime
law

There is no doubt that the commonest kind of external act, namely, one which causes a collision, is governed solely by the general maritime law as administered in England, and not by that combination of English and foreign law which is required by the principle laid down in *Phillips v. Eyre*.³ All questions of collision are questions *communis iuris*⁴ and must be decided by the law maritime.⁵ Brett L.J. affirmed this view in the following words:

¹ *Regina v. Anderson* (1868), L.R. 1 C.C.R. 161, 168; *Regina v. Keyn* (1876), L.R. 2 Ex. D. at p. 94. But not for the purpose of jurisdiction, *Chung Chi Cheung v. The King*, [1939] A.C. 160.

² *Canadian National Steamship Co. v. Watson*, [1939] 1 D.L.R. 273, cited 3 I. & C.L.Q. 116. Compare Merchant Shipping Act, 1894, S. 265, which deals with a conflict of laws in matters affecting masters and seamen.

³ *Supra*, pp. 281, et seqq.

⁴ *The Johann Friedrich* (1839), 1 W. Rob. 36, 37, per Dr. Lushington.

⁵ *The Wild Ranger* (1862), Lush. 553; *The Zollverein* (1856), Swa. 96; *The Leon* (1881), 6 P.D. 148; Dicey, pp. 971-2; Foote, pp. 524-5.

'The case comes to this, whether an action for a tort committed on the high seas between two foreign ships (for I assume for this purpose that both are foreign ships) can be maintained in this country, although it is not a tort according to the laws of the courts in that foreign country. From time immemorial, as far as I know, such actions have been maintained in the Court of Admiralty. . . . Therefore, even if I assume these to have been Dutch ships, it seems to me that, inasmuch as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England, but by the maritime law, which is part of the common law of England, as administered in this country.'¹

The natural inference to draw from the expression 'general maritime law' is that there exists a body of law which is universally recognized as binding upon all nations in respect of acts occurring at sea. There is, however, no such law.² The expression, in truth, means nothing more than that part of English law which, either by statute or by reiterated decisions, has been evolved for the determination of maritime disputes.³ It is the law which, despite the animadversions of Westlake,⁴ must be applied to all questions of collision unless international regulations have been laid down by a convention between States.⁵ It may be asked, indeed, whether the bewildering number of laws that might require consideration would not make it impossible to apply the ordinary rule as laid down in *Phillips v. Eyre*.⁶

Meaning of
'general
maritime
law'

If, for instance, an action were brought in England in respect of a collision between two foreign ships of different nationality, the almost impossible feat of referring to three laws would impede any attempt to apply the ordinary rule. The impediment would become insuperable if a third ship of yet another nationality had contributed to the collision.

The question that now arises is whether this maritime law must be applied to all external acts, i.e. to all cases where the alleged wrong consists of some act, other than a collision, done by a foreign ship to the property of another, as, for example,

Does
general
maritime
law govern
all acts
external to
a ship?

¹ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 537.

² *Lloyd v. Guibert* (1865), 1 Q.B. 115, 123-5.

³ *The Gaetano and Maria* (1882), 7 P.D. 1; 137, 143.

⁴ *Private International Law*, pp. 290-1.

⁵ The collision regulations at present in force are those which form an annex to the London Convention of 1929; Merchant Shipping (Safety and Load Line Conventions) Act, 1932, 22 & 23 Geo. V, c. 9, schedule 1.

⁶ *Supra*, p. 281.

where a submarine cable is fouled¹ or where possession is seized of a wreck that is being salvaged by a third party.² In many such cases, unlike the case of a collision, there would be little difficulty in applying the principle of *Phillips v. Eyre*, but in others it would be almost impossible. If, for instance, two or more foreign ships carrying different flags were involved in a dispute concerning the capture of whales³ it might be virtually impossible to refer to each law, since the act might be innocent in one of the countries and wrongful in the others. Again, it seems a little strained to treat the law of the flag in maritime wrongs as being equivalent to the *lex loci delicti commissi* in the case of torts on land. The reason why English law requires proof that a wrong committed in a foreign country is unjustifiable by the *lex loci* is that the offending act has been committed within the exclusive jurisdiction of a foreign sovereign, but, as Brett L.J. has shown, there is no such thing as exclusive jurisdiction over the high seas.⁴ If the place where a wrong is committed is subject to no exclusive jurisdiction, it is surely a misnomer to speak of a *lex loci*. It is possible to speak of a *lex loci* only where all the acts have occurred on board a single foreign ship. Finally, the sphere of authority possessed by the general maritime law has been described in such comprehensive terms by the judges that it would appear to cover all torts committed on the high seas.⁵

Conclusion ✓ In conclusion, therefore, the rules adopted by English courts for the choice of law, so far as regards torts committed at sea, may be stated as follows: First, a plaintiff who sues in England in respect of acts, all of which have occurred on board a single foreign vessel, must prove that the conduct of the defendant was not justifiable by the law of the flag, and that it would have been actionable had it occurred in this country.

Secondly, all other acts occurring on the high seas and later put in suit in England must be tested solely by English maritime law.

¹ *Submarine Telegraph Co. v. Dickson* (1864), 15 C.B. (N.S.) 759.

² *The Tubantia*, [1924] P. 78.

³ Dicey, pp. 970 et seqq.

⁴ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, 536-7.

⁵ *Ibid.*; *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, 125; *The Gaetano and Maria* (1882), 7 P.D. 1; 137, 143.

PART IV

FAMILY LAW

CHAPTER XI. HUSBAND AND WIFE

CHAPTER XII. LEGITIMACY AND LEGITIMATION

CHAPTER XIII. INFANCY AND LUNACY

CHAPTER XI

HUSBAND AND WIFE

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I. THE MEANING OF 'MARRIAGE'

Importance
of proving
validity of a
marriage

THE occasions are frequent and various upon which the existence of a marriage must be established as a preliminary to legal proceedings. The matter may concern many different parts of the law. Thus the institution of a matrimonial cause, such as a petition for divorce, judicial separation or annulment of marriage, implies that the parties are related to each other as husband and wife. If a person claims an inheritance as the widow or widower of the deceased; if a beneficiary under a will asserts a right to pay death duties at a lower rate, as being the surviving spouse of the testator; in each case a preliminary to success is proof that a regularly constituted marriage exists. The existence of the marriage tie is equally essential in several departments of criminal law, as, for instance, where, in the case of desertion, cruelty or assault by her husband, a woman seeks relief under the Summary Jurisdiction Acts, 1895-1925, or where a person is prosecuted for bigamy. All these matters, and indeed many others, may raise a problem of private international law, since the parties in question may, for instance, have contracted a union abroad which, though valid by the *lex loci celebrationis* or by the *lex domicilii*, does not create the status of marriage according to English law.

Two cases
in which
mono-
gamous
marriage
alone
considered

It is therefore essential that we should ascertain what the nature of a union must be before the English courts will accept it as creating the relationship of husband and wife. We must know what constitutes a marriage according to English private international law. For a union to constitute a valid marriage according to English internal law it must be the voluntary union for life of one man and one woman to the exclusion of all others. Thus polygamous marriages are *inter alia* excluded. The question to be considered, however, is whether a union must be of this monogamous character before it will be regarded as a valid marriage by private international law. It may be said without hesitation that so far as succession to English land and the exercise of English matrimonial jurisdiction are concerned no union will qualify as a marriage unless it is monogamous.

The succession *ab intestato* to immovables is governed by the *lex situs*, and it is clear that the peculiar canons of descent governing succession to an entailed interest in English land can scarcely determine kinship among the issue of a poly-

gamous union. The same is true of succession to a title of honour.¹

What is more important is that a matrimonial cause, such as a petition for divorce or for a maintenance order, will not be entertained unless the parties are monogamously married.² Their union must be monogamous, not merely within their intention, but also in the eyes of the legal system that determines its character.³

'I conceive that marriage, as understood in Christendom, may for *this purpose* be defined as the voluntary union for life of one man and one woman to the exclusion of all others.'⁴

The principle was established in *Hyde v. Hyde*,⁵ where a husband petitioned the English court for a dissolution of the marriage which he had contracted with his wife in Utah according to the rites and ceremonies of the Mormons. It appeared in evidence that at the time of the marriage polygamy was a part of the Mormon doctrine and was the common custom in Utah. This fact was fatal to the petition, since it sought to take advantage of a system of law which was attuned to marriages of an entirely different nature. In the words of Lord Penzance:

'Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created.'⁶

The learned judge, after mentioning some of the provisions and remedies that form part of the matrimonial law, proceeded to show how unjust, and indeed absurd, it would be to apply these to polygamous unions. To divorce a Hindu, for instance, from one of his wives on the ground that he had committed adultery with bigamy, would be to furnish a remedy where there was no offence.

¹ *The Sinha Peerage Claim* (1939), 171 *Journals of the House of Lords*, 350; [1946] 1 All E.R. 348.

² *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; *Brinkley v. A.-G.* (1890), 15 P.D. 76; *Nachimson v. Nachimson* (1930), P. 217; *Mehta v. Mehta*, [1945] 2 All E.R. 690; *Risk v. Risk*, [1951] P. 50; *Sowa v. Sowa*, [1961] 2 W.L.R. 313.

³ As to what law determines whether a marriage is monogamous or polygamous see *infra*, pp. 309 et seqq.

⁴ *Hyde v. Hyde*, *supra*, at p. 133, per Lord Penzance. Italics supplied.

⁵ (1866), L.R. 1 P. & D. 130.

⁶ *Ibid.*, at p. 135.

Non-Christian marriage may be monogamous A marriage does not fail to qualify as monogamous merely because neither party is a Christian. All that is necessary is that a union should possess the essential attributes of a Christian marriage. Therefore a marriage solemnized in Japan according to the local forms, between an Englishman domiciled in Ireland and a Japanese woman, was recognized as valid in England, upon proof that by the law of Japan marriage is the union of one man and one woman to the exclusion of all others.¹

Sufficient if marriage monogamous in its inception It is sufficient if the marriage, though contracted according to a non-Christian form, is monogamous in its inception. Thus one of the rules binding Hindus who belong to the Arya Samaj or to the Brahma Samaj sect is that their marriages must be monogamous. Therefore a marriage contracted by a Hindu in Bombay according to this faith was held to be monogamous for the purposes of English law notwithstanding that it was open to him at a later date to become an orthodox Hindu with freedom to take a second wife.²

Dissolubility of a marriage irrelevant to its original character The inception of the marriage is also the decisive date for testing whether it is a union for life. The court concentrates its attention solely upon the marriage contract and upon the law or laws by which its nature is determined, but disregards the manner in which it may be terminated. In *Nachimson v. Nachimson*³ the untenable proposition was advanced that account should be taken of the conditions upon which the dissolution of the union might later be obtained. It was argued that if the *lex loci celebrationis* was prepared to grant a divorce on easy terms, as, for instance, at the will of either of the parties, the union could not be recognized as a marriage by English law. This argument overlooked two facts.

First, the dissolubility of a marriage can have no bearing upon its original character, for the validity of any contract, whether matrimonial, mercantile or otherwise, stands apart from the conditions of its defeasance.⁴ The question to be answered is whether the parties have married in a form which contemplates that in the ordinary course of things they will

¹ *Brinkley v. A.-G.* (1890), L.R. 15 P.D. 76. *Spivack v. Spivack* (1930), 46 T.L.R. 243 (Jewish marriage); *Isaac Penhas v. Tan Soo Eng*, [1953] A.C. 304 (marriage between a Jew and a non-Christian Chinese solemnized according to mixed Chinese and Jewish rites).

² *The Sinha Peerage Claim*, [1946] 1 All E.R. 348. Polygamy among Hindus was abolished by the Hindu Marriage Act, 1955. See 6 *I. & C.L.Q.*, pp. 263 et seqq. (Paras Diwan).

³ [1930] P. 217. See also *Mehta v. Mehta*, [1945] 2 All E.R. 690.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 533.

cohabit as man and wife for the rest of their lives. The possibility of a later divorce cannot affect the character of their original intention.

Secondly, the *lex loci celebrationis* as such has nothing to do with the question of divorce, which is a matter solely for the law that happens to be the *lex domicilii* of the parties at the time of the suit. This may well be different from the law that governed the celebration of the marriage. Pressed to its logical conclusion, therefore, the argument that the original nature of a union depends *inter alia* upon its dissolubility seems to involve the manifestly absurd requirement that other laws with which the parties may later form a domiciliary connexion, i.e. all laws in the world, must also be considered. In *Nachimson v. Nachimson*:¹

The issue, which arose in a suit for judicial separation, was whether a marriage, contracted at Moscow between two domiciled Russians according to Russian law, constituted a marriage in the eyes of English law. Russian law, until it was altered in 1944, regarded a marriage as terminable at the will of either party. If both parties desired a divorce they were entitled to demand that it should be registered by the appropriate official. If one of the spouses desired a divorce against the wishes of the other, judicial proceedings had to be instituted, but even so it was the duty of the judge to pronounce a decree of dissolution, provided that the wishes of the petitioner were formally declared.

The Court of Appeal held that notwithstanding the facility with which a divorce was obtainable the union possessed the essential legal characteristics of a valid marriage, since the law under which it was contracted envisaged its indefinite continuance.

This decision corrects the anachronistic view, expressed, for instance, in *Hyde v. Hyde*,² that in English law a marriage must be a Christian marriage in the strict sense understood by the Western Church. Since the original doctrine of the Church was that marriage was dissoluble only by death, it followed that the parties must have contracted a union for their joint lives. The doctrine of non-dissolubility, however, has long been abandoned by English law, and the only Christian characteristics now demanded are that a marriage should be monogamous, and that it should be a union for life in the sense of not being limited in duration. It is a Christian marriage according to English law if it is potentially for life.

¹ [1930] P. 217.

² (1866), L.R. 1 P. & D. 130.

Are poly-
gamous
unions dis-
regarded in
every
respect by
English
law?

The authorities that have been considered so far establish, then, that a polygamous union is never regarded as a marriage by English domestic law, and is disregarded by English private international law so far as matrimonial jurisdiction and the succession to English land and titles of honour are concerned. The question, however, is whether this repudiation of polygamy extends to other branches of the law. Is a polygamous marriage never to be regarded as creating the relationship of husband and wife? A few problems will show that this question is not of mere academic interest.

If a man domiciled in Sierra Leone, having contracted two polygamous marriages according to native law and custom, dies intestate, leaving land in England, are his wives entitled to the rights given to a surviving spouse by the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952?

A British subject acquires a domicile in Persia, embraces the Moslem religion, and marries a Persian lady in Teheran according to the Mohammedan law which allows a plurality of wives. Later he takes another wife and ultimately dies in Persia leaving two wives and children by both. Money belonging to the deceased is held by an agent in England. Will an action, brought by the wives and children to recover the shares legally due to them under Mohammedan law, fail on the ground that according to English law the wives are not lawful wives and the children are not legitimate?

Will it make any difference in the last case if the husband, though domiciled in Persia, contracted the two Mohammedan marriages in London?

If one of the wives of a Mohammedan comes to England and marries an Englishman, can she be indicted for bigamy?

Is a Mohammedan wife, who succeeds upon the death of her husband to property held under an English settlement, entitled in accordance with the Finance Act, 1910, to pay estate duty at a lower rate as being the 'wife' of the predecessor?

Incongruous for English law to disregard polygamy

If the principle of *Hyde v. Hyde* is that English courts must rigidly deny recognition in any form to polygamous marriages,

¹ For a discussion of the subject see 48 *L.Q.R.* 341 et seqq. (Beckett); 66 *Harvard Law Review*, 961 et seqq. (Morris); 31 *B.Y.B.I.L.* 248 et seqq. (Sinclair). *Society of Comparative Legislation Journal*, ii. (n.s.), 379, an article on non-Christian marriages by Sir Dennis Fitzpatrick.

² 19 *M.L.R.* 690 (P. R. H. Webb).

³ *Society of Comparative Legislation Journal*, ii. (n.s.), 376.

⁴ Cp. *In re Ullee* (1885), 53 *L.T.* (n.s.) 711; 54 *L.T.* (n.s.) 286.

⁵ Case put by Lush L.J. in *Harvey v. Farnie* (1881), 6 *P.D.* 35, 53. Cf. *R. v. Naguib*, [1917] 1 *K.B.* 359; *R. v. Superintendent Registrar of Marriages, Hamersmith*, [1917] 1 *K.B.* 634, 647; *Baindail v. Baindail*, [1946] *P.* 122, 130.

⁶ Cp. the South African case of *Seedat's Executors v. The Master*, *infra*, p. 419.

the logical answer to the above questions will appear a little odd, if not ironical, when it is remembered that polygamy, though its area has been drastically reduced in recent years, is still a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt and Morocco, but also of many parts of the British Commonwealth. Moreover the Privy Council, in hearing appeals from these places, has consistently recognized the validity of polygamous marriages and the legitimacy of the children of second wives.¹ As one learned writer has said, to boycott polygamy would be to 'ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards and all property left by an intestate among them as escheating or becoming ownerless'.² It would also be inconsistent with the recognition by the courts of Jewish marriages despite their potentially polygamous character. Hebraic law permits a second wife to be taken during the lifetime of the first, and though this has long ceased to be the custom in European countries, the practice is by no means unknown in Morocco and countries farther east where Jews are personally subject to the law of their own religion. Having regard to the observations made by the judges in *R. v. Millis*,³ it is unthinkable, for instance, that a marriage in Syria between two Jews according to Hebrew religious law should be regarded as a nullity by an English Court. If this is a correct assumption, it would be strangely incongruous to place other potentially polygamous unions on a lower level.

Nevertheless, there were several dicta in the older authorities which supported the view that a union contracted according to the rites of a law which recognizes polygamy will in all respects and for all purposes be denied the status of marriage. In a well-known passage Lord Brougham expressed himself as follows:

Dicta
favouring
disregard of
polygamy

'It is important to observe that we regard it [marriage] as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate.'⁴

¹ *Cheang Thye Phin v. Tan Ah Loy*, [1920] A.C. 369; *Khoo Hooi Leong v. Khoo Hean Kwee*, [1921] A.C. 529; *Khoo Hooi Leong v. Khoo Chong Yeok*, [1930] A.C. 346, 355.

² *Society of Comparative Legislation Journal*, ii. (n.s.), 379 (Sir Dennis Fitzpatrick).

³ (1844), 10 Cl. & F. 534.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 532.

Lush L.J. considered that a marriage contracted abroad according to the local law of polygamy was 'a union falsely called marriage' which would not be recognized in England;¹ a few years later Stirling J. felt himself 'bound to hold' that a Baralong marriage was not valid;² and in 1917 Avory J. was prepared to hold that a Mohammedan form of marriage contracted by an Egyptian in Egypt was to be regarded as a nullity in England.³

These
dicta now
repudiated

It is clear that *Hyde v. Hyde* did not go to these lengths, for Lord Penzance was careful to stress the limits of his decision in the following words:

'This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law in England.'⁴

Fortunately, the question is no longer doubtful, for it has now been decided that a polygamous union contracted in accordance with the law of the husband's domicile is recognized as a valid marriage by English law for many purposes. The first explicit break with the older view came with Lord Maugham's statement in *The Sinha Peerage Claim*, 1939.

'It cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges), that a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I will refer later.'⁵

Seven years later the matter was carried further by the Court of Appeal in *Baindail v. Baindail*,⁶ where the facts were these:

A man, while domiciled in India, married an Indian woman in India in 1928 according to Hindu rites. During the subsistence of this

¹ *Harvey v. Farnie* (1880), 6 P.D. 35, 53.

² *In re Bethell* (1887), 38 Ch.D. 220, 234.

³ *R. v. Naguib*, [1917] 1 K.B. 359.

⁴ (1866), L.R. 1 P. & D. 130, 138.

⁵ (1939), 171 Lords Jo. 350; [1946] 1 All E.R. 348. The exception was the inheritance of English land.

⁶ [1946] P. 122, affirming Barnard J., who had already given a similar decision in *Srini Vasan v. Srini Vasan*, [1946] P. 67; *Ohochuku v. Ohochuku*, [1960] 1 W.L.R. 183.

marriage, he later went through an English ceremony of marriage at the Holborn registry office with the petitioner, an Englishwoman.

It was held that the Hindu marriage, though potentially polygamous in character at that date, was to be recognized as valid by an English court, that it was a bar to a subsequent monogamous marriage in England, and that therefore the petitioner was entitled to a decree nisi for the annulment of her marriage.

In the course of his judgment, Lord Greene, after adverting to the married status that the man possessed by virtue of the Hindu law of his domicile, said:

'Will that status be recognized in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognized. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognize the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases.'¹

The exact limits within which a polygamous status demands recognition have not yet been worked out by the courts. Thus, in the same judgment, Lord Greene was at pains to stress that his remarks and the decision of the court had no bearing upon the law of bigamy, but that whether a man already married according to Hindu law would be indictable for going through a later ceremony in England would depend upon the correct interpretation of the word 'married' in the Offences Against the Person Act, 1861.²

The final question is—What law determines whether a marriage is monogamous or polygamous? If, for instance, a woman domiciled in England marries a Moslem in London

What law determines the character of a marriage?

¹ At pp. 127-8. In the earlier case of *In the Estate of Abdul Majid Belshah*, *The Times* newspaper 16 and 18 Dec. 1926; 14 and 18 Jan. 1927; 48 *L.Q.R.* 348, where a Mohammedan domiciled in Baghdad had married two English wives in England according to Mohammedan rites, an order of court was made which was based upon the assumption that both marriages were valid and also that the children of each wife were legitimate. In a case similar to that suggested by Lord Greene, the Californian court distributed the intestate's property equally between his two surviving wives; *Bir's Estate* (1948), 83 *Cal. App. 2d.* 256; Cheatham, *op. cit.*, p. 721.

² At p. 130. For a detailed discussion of the question of bigamy see 17 *M.L.R.* 344 et seqq. (G. W. Bartholomew).

intending to live with him in Pakistan where he is domiciled, is the character of the marriage determinable by English law as being the *lex loci celebrationis* or by the Pakistani law of the matrimonial domicile?

Authorities
in favour of
the *lex loci*
celebrationis

The authorities, so far as they go, favour the exclusive application of the *lex loci celebrationis*.¹ In the words of one writer:

'A marriage celebrated before an English public officer (clergyman, registrar, marriage officer under the Foreign Marriage Act,² &c.) must always be understood to be a monogamous one, even though a party to it may be a person who in his own country could have contracted a polygamous marriage.'³

It is submitted, however, that this view is not in accordance with principle. There can be no doubt, of course, that the *lex loci celebrationis* alone determines the formal validity of the marriage.⁴ If two parties go through a ceremony of marriage in London in the manner provided by English law they become husband and wife, but the instant problem is not whether they are so related, but what is their position *vis-à-vis* each other once the relationship has been created. This is a question of status, of the essential validity of the marriage, with which the *lex loci celebrationis* as such has nothing whatsoever to do. In a case concerning the validity of a divorce obtained in the foreign domicile of the parties, Lord Selborne used words that in the present context are particularly apt.

'When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes? She becomes the wife of the foreign husband in the case where the husband is a foreigner to the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from placing herself by contract in relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore, it must be within the meaning of such a contract . . . that she is to become subject to her husband's law, subject

¹ *R. v. Superintendent Registrar of Marriages, Hammersmith, ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634, *infra*, p. 402; *Chetti v. Chetti*, [1909] p. 67; *R. v. Naguib*, [1917] 1 K.B. 359; *Maher v. Maher*, [1951] 2 All E.R. 37. The same view prevails in Scotland, *Lendrum v. Chakravati* (1929), S.L.T. 96.

² *Infra*, p. 334.

³ Westlake, 7th ed. by Bentwich, p. 69.

⁴ *Infra*, p. 330.

to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicile.'¹

'Universality is the basic principle of status in private international law'² in the sense that the effect and consequences attributed to a status by the law of the domicile ought to be recognized by all courts in the world. It is this law that admittedly governs the essential validity of a marriage, an expression comprehensive enough to include the character of a marriage, as being, for instance, void or voidable,³ or polygamous as opposed to monogamous. In a leading case, Lord Greene was at pains to distinguish formal from essential validity, and to propound that the latter is governed by 'the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage'.⁴

Marriage, though universal, is heterogeneous relationship in the sense that its consequences are not uniform throughout the world. Perhaps its one common feature is the consensual union of a man and a woman. How the consent is registered, whether in this or that form, is of no great significance. Of greater importance is the nature or character of the union once it has been brought into existence, and in this respect there is no uniformity. The consequences of the union, whether it excludes other wives, whether it is terminable and if so by what methods, what rights, powers and capacities it vests in the parties—all these essential matters which define the nature of the relationship are subject to widely different principles in different legal systems. They are matters that affect in the most intimate fashion not only the personal relation of the parties in their daily existence, but also the community in which they live, and therefore it seems only rational that they should be determinable by the law of the country where the parties, in fulfilment of their original resolve, have established their matrimonial home. This, indeed, was the decision reached in an early Canadian case.⁵

As against this view it may perhaps be objected that a woman domiciled in England is incapacitated from contracting a polygamous marriage. That branch of private international law

¹ *Harvey v. Farnie* (1882), 8 App. Cas. 43 at p. 50.

² *In re Luck's Settlement Trust*, [1940] Ch. 864 at p. 894, per Scott L.J.

³ *De Reneville v. De Reneville*, [1948] p. 100.

⁴ *Ibid.*, at p. 114.

⁵ *Connolly v. Woolrich and Johnson* (1867), 11 Lower Canad. Jurist 197; appd. *sub nom Johnson v. Connolly* (1869), 1 Revue Légale 253 (Quebec).

dealing with capacity to marry, however, is irrelevant in the present context, for as Foote has convincingly shown the only incapacities properly so called are those of the infant and the person of unsound mind.¹

Another possible objection, based on the analogy of the rule that forbids a marriage within the prohibited degrees,² is that a person, if domiciled in England, is forbidden to contract a polygamous union. This analogy, however, is false,³ and so far as is known there is no independent rule of English law rendering such a union illegal or void, though conceivably one might be constructed on the ground of public policy. Indeed, in *Risk v. Risk*⁴ Barnard J. refused to declare that a polygamous marriage contracted in Egypt by a woman domiciled in England was void. What is, of course, true is that if a person, having contracted such a union, remains domiciled in England, then any question dependent upon the validity of his marriage and determinable by English domestic law must be answered on the footing that the marriage is void. This is presumably the explanation of the controversial case of *In re Bethell*.⁵

Judicial
support for
the law of
the matri-
monial
domicil

The present submission, that the nature of a marriage is on principle determinable by the law of the matrimonial domicil, not by the *lex loci celebrationis*, is not devoid of judicial authority. Thus, at the beginning of the nineteenth century, Lord Brougham expressed himself as follows:

‘An Englishman, marrying in Turkey, contracts a marriage of the English kind, that is, excluding a plurality of wives, because he is an

¹ *Private International Law* (5th ed.), pp. 98–100, 383–4. *Infra*, p. 327.

² *Infra*, p. 353.

³ It has been said, for instance, that : ‘If a domiciled Englishman cannot marry his divorced wife’s sister . . . even in a country where such marriages are lawful, and even if the woman is domiciled there, it follows *a fortiori* that he cannot, merely by going to a country where polygamy is lawful, contract a valid polygamous marriage’; Dicey p. 277. But surely these two situations are not *in pari materia*. A rule which forbids *A* to marry *B* is scarcely germane to the inquiry whether his marriage with *C* is monogamous or polygamous, there being no question of prohibited degrees.

⁴ [1951] P. 50.

⁵ (1887), 38 Ch.D. 220. *Society of Comparative Legislation Journal* (2nd series), p. 386. In one case, where a woman domiciled in England married in London according to Mohammedan forms an Indian Moslem who already had one wife, Chitty J. said: ‘It was not a marriage binding on any spouse of English domicil, the reason being that it was not intended to be a marriage’, *In re Ullee* (1885), 53 L.T. (N.S.) 711. What he presumably meant was that it was not intended to be a monogamous marriage, for, citing *Hyde v. Hyde* (*supra*, p. 303), he proceeded to say that it could not attract English matrimonial remedies.

Englishman and only residing in Turkey and under Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England and for English purposes; consequently the incidents and effects, nay, the very nature and essence, must be ascertained by the English and not by the Turkish law.¹

In more recent years, Denning L.J., as he then was, pursued much the same line of reasoning when dealing specifically with the case where a person whose *lex domicilii* recognizes only monogamy marries another whose *lex domicilli* is founded on monogamy.

'When an Englishwoman marries a man of a polygamous race at a register office in England *intending to set up home here*,² the substantial validity of the marriage, as well as its formal validity, depends on the personal law of the wife, and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous. Suppose that the couple afterwards change their minds and go to live in the husband's homeland and he takes to himself another wife, as he may lawfully do there; the English wife cannot sue for divorce in England. She must bring her suit in his homeland, but she cannot succeed in it because polygamy is there permitted. Has she then no remedy? I say she clearly has a remedy in our courts. It was a condition of the marriage, imported by her personal law, and accepted by him, that the man should not take to himself another wife during the lifetime of the first. When the man took a second wife, that condition was broken and the marriage was voidable at her instance in our courts for failure of the condition.

'Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, *intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous*:² the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife.³ The marriage is valid by the law of that country and is, I should have thought, valid here. There was no condition of the marriage that it should be monogamous. If he in his own country takes to himself another wife, the English wife cannot complain. She could not ask in these courts for the marriage to be avoided. So also, *if she while in England, marries a man of a polygamous race, intending to go to live with him in his homeland, knowing what marriage means in that country, there would be no condition that it should be monogamous, and the marriage would not be made on that basis*; ² and she could not complain if he there took another wife.⁴ *In re Bethell*⁵ supports

¹ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 535.

² Italics supplied.

³ Such a case was *Risk v. Risk*, [1951] P. 50.

⁴ These words were evidently not cited to *Maier v. Maier*, [1951] 2 All E.R. 37.

⁵ (1887), 38 Ch.D. 220.

the view that the substantial validity of a marriage may depend on the personal law of one of the parties to it; but I am not sure that the decision itself would be the same today.

'The case where a domiciled Englishman marries a woman of a polygamous race should, I think, be determined on the same principles as I have stated for the common case.'

II. CAPACITY TO MARRY

1. *Objections to the rule as commonly stated.*

Usual view: law of domicile of each party must be satisfied According to the traditional and still prevalent view capacity to marry is governed by what may conveniently be called the dual domicil doctrine. This prescribes that a marriage is invalid unless, according to the law of the domicil of both contracting parties at the time of the marriage, they each have capacity to contract that particular marriage.¹ This is said to be true whether the incapacity is 'absolute', i.e. one which forbids a person, such as an infant, to marry anyone; or 'relative', i.e. one which forbids two individual persons, such as an uncle and niece, to marry each other.²

Under this doctrine, a marriage, for instance, between a man of the Jewish faith domiciled in Russia and a woman of the same faith domiciled in England, the latter being his niece, is invalid, since a marriage between persons so related, though permissible in Russia, is prohibited by English law.³

The doctrine would be comparatively innocuous if the expression 'the law of the domicil of each party' were construed to mean, not the rule that would be applied in that domicil to a purely domestic case, but the rule applicable to the particular marriage in question, i.e. to one containing a foreign element. A domestic rule, such as one forbidding a marriage between a man and his niece, need not be inevitably extended to a conflict of laws case where, for instance, the niece, though domiciled at present in England, proposes to marry a man domiciled in Russia and to cohabit with him in that country. In such a case an English court might conceivably decide that this particular

¹ Dicey, pp. 249 et seqq.; Wolff, pp. 332-7; Halsbury's *Laws of England*, vol. 7, p. 124.

² Westlake, s. 21, p. 57. What Westlake calls a 'relative' incapacity is not an incapacity in the true sense. 'That is rather a question of illegality than of capacity'; *Ogden v. Ogden*, [1908] P. 46, at p. 74. See *infra*, p. 327.

³ 34 *Transactions of the Grotius Society*, 100.

rule of the *lex domicilii* does not apply to a marriage which is primarily the concern of Russian law.¹

If, however, 'the law of the domicile' means, as in practice it is in this context taken to mean, the internal law of the country concerned, the application of the dual domicile doctrine may produce a result that is calculated to shock the conscience of all save the most obstinate of doctrinaires. *In re Paine*² affords (C) 1940 -

Application
of this view
may cause
injustice

(D) facts. An English testatrix, who died in 1884, left a sum of money on trust for her daughter, *W*, for life, and, if she died leaving any child or children surviving, then on trust for her absolutely.

W was a British subject domiciled in England. In 1875 she travelled to Germany and married *H*, her deceased sister's husband, a German subject. *H* had lived in England for some time shortly before the marriage,³ and he and his wife continued to live there until their respective deaths. He died in 1919, she died some twenty years later. One daughter of the marriage survived *W*.

In these circumstances the legacy to *W* would not become absolute unless the surviving daughter was her legitimate child, for the rule is that a reference in a will to a 'child' means a legitimate child only, unless a different intention can be collected from the context.⁴ Whether the daughter was legitimate depended upon whether the marriage in 1875 was valid. At that time a marriage between a woman and her deceased sister's husband was prohibited by English law, but allowed by German law. Bennett J. adopted the dual domicile doctrine and held the marriage to be void because of the incapacity attaching to *W* under her pre-marriage *lex domicilii*.

Bennett

In the circumstances the decision, though not the *ratio decidendi*, was unexceptionable, since the parties intended to establish, and did in fact establish, their matrimonial home in England. It was, therefore, for English law to determine the desirability of their marriage. But the dual domicile doctrine pays no regard whatsoever to the country where the parties cohabit as husband and wife. The doctrine would have required Bennett J. to reach the same decision had the parties lived together in Germany for the rest of their lives without once returning to England. Had this been the case the woman according to German standards would have been a lawful wife

¹ Cf. the forceful remarks of Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 444 et seqq.

² [1940] Ch. 46. For a detailed analysis see 56 L.Q.R. 514 et seqq.

³ See the facts as reported (1940), 161 L.T. 266, 267. ⁴ *Infra*, p. 415.

and a respectable member of society. Under the dual domicil doctrine, however, despite her abandonment of England, she would have possessed the status of a concubine and her sin would inexorably have been communicated to her children. A doctrine which can work such havoc with human happiness and which is so out of harmony with what the reasonable man would expect is suspect. It is not common sense and for that reason alone is probably not part of the common law. As will be suggested later, it is sociologically unsound, wrong in principle, and in practice ineffectual in the sense that in the majority of cases its apparent object can be frustrated without difficulty. Moreover, in the confused state of the authorities it is more than doubtful whether it represents the law of England.

Rival view based on matrimonial home It is submitted that the correct doctrine is that which submits the question of capacity to what may briefly be termed the law of the intended matrimonial home. More fully stated, the doctrine is this.

The basic presumption is that capacity to marry is governed by the law of the husband's domicil at the time of the marriage, for normally it is in the country of that domicil that the parties intend to establish their permanent home. This presumption, however, is rebutted if the reasonable inference is that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there.

Lex loci celebrationis cannot be disregarded At first sight, it may seem paradoxical that the governing law should depend upon a subsequent event—the place where the conjugal home is set up. It must be stressed, however, that the question whether a marriage is void for incapacity arises after, generally long after, its solemnization, so that it will be known whether the pre-marriage intention of the parties with regard to their future domicil has in fact been fulfilled. This theory of the intended matrimonial home does not, of course, imply that the law of the place where the marriage is actually celebrated is to be disregarded. That would be impossible. Obviously no system of law can allow the use of its procedure for the contracting of unions which it considers to be void owing to nonage, incest or any other reason. Therefore, the authorities in any country will justifiably forbid the celebration of a marriage if the parties do not possess capacity according to the local law.

Evaluation of the two views Postponing for a moment a consideration of the actual decisions, the question may now be asked—What are the respective merits of the two rival doctrines?

It is submitted that on sociological grounds the doctrine of the dual domicile is inferior to that of the intended matrimonial home. Marriage is an institution which closely concerns the public policy and the social morality of the State. In the words of Lord Penzance:

(i) Sociological grounds ✓

'It confers a status on the parties to it and upon the children that issue from it. Though entered into by individuals it has a public character. It is the basis upon which the framework of civilized society is built; and as such is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it.'

The general laws which dictate its incidents, however, vary not inconsiderably in different countries, and where a woman domiciled in one country marries a man domiciled in another the question naturally arises—Which State is to control the incident of capacity? Which State is in the nature of things entitled to demand pre-eminent consideration for its code of social morality? The obvious answer would seem to be—the State in which the parties set up their home.

A rule for the choice of law, such as that imposed by the dual domicile doctrine, commands little respect if it is framed without regard to its impact upon the social life of the community that will be most intimately affected by its operation. It seems reasonably clear that whether the intermarriage of two persons should be prohibited for social, religious, eugenic or other like reasons is a question that pre-eminently, if not exclusively, affects the community in which the parties live together as man and wife. Dealing with the case where the wife takes up her residence in the State in which the husband had his pre-marriage domicile, an acute American commentator has summarized the position in these words:

'It seems almost too clear for argument that the law of that State ought to be applied in determining the capacity to marry, since that State is the only one actually concerned socially with the marital status of the two people involved.'

It is the law there in force which more than any other law is entitled to pass judgment upon the propriety or impropriety of the union. To take even the extreme case of an absolute

¹ *Mordaunt v. Mordaunt* (1870), L.R. 2 P. & D. 103, 126.

² Cook, *Logical and Legal Bases of Conflict of Laws*, p. 448. See also the statement of Lord Sorn in *Bliersbach v. McEwen* (1959), S.L.T. 81 at p. 89 (Court of Session).

incapacity, if an English girl fifteen and a half years of age, contrary to the law of England, marries a foreigner domiciled in a country whose law permits marriage at this early age, it may be doubted whether it is justifiable to regard the union as void. The social life of England is unaffected, for the girl proposes to sever her connexion with this country. It has, indeed, been objected that this is to minimize the value that the girl possesses in her pre-nuptial domicil. It is alleged that 'an unmarried woman is without question of value to the State in which she lives, of which she is a useful citizen, and to the social and economic resources of which she may contribute as a worker, as a householder, as a tax or rate-payer; and ultimately, if married to a domiciliary of that state, as a mother'.¹ To this it may be answered that paternal government, though tiresome, is bearable if kept within reasonable bounds, but that to treat a female subject, not as a person whose happiness deserves promotion, but as an economic and fecund asset to be retained at all costs, represents a somewhat lamentable philosophy of life.

(ii) Prin-
✓ ciple

Apart from sociological considerations, principle alone seems to demand that where the parties are domiciled in different countries before their marriage questions of the essential validity of the union, including their personal capacity, should be governed by the law of the place where they establish their joint home. This is not incompatible with legal doctrine.² A close analogy is to be found in the rules for the choice of law concerning contracts in general. Here the rule is that capacity is governed by the law of the country with which in fact the contract has the most substantial connexion.³ Moreover, if performance is to occur wholly in a country different from that in which the contract was made, it is normally the law of the place of performance that governs. The identity of the country with which the contract to marry is most substantially connected or in which it is to be performed admits of no doubt.

'A connection,' said Lord Brougham many years ago, 'formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word their domicil.'⁴

¹ Graveson, *Journal of Comparative Legislation and International Law*, vol. xx, Part I, p. 62.

² See *ibid.*, at pp. 60 et seqq.

³ *Supra*, p. 213.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 536. It has, indeed, been

Dealing with the normal case, where the wife moves to the domicile of her husband, Savigny expresses the true doctrine with considerable force.¹

'There is no doubt', he says, 'as to the true seat of the marriage relation; it must be presumed to be at the domicile of the husband, who, according to the laws of all nations and of all times, must be recognized as the head of the family. For this reason, too, the territorial law of every marriage must be fixed according to it; and the place away from the domicile where the marriage may be celebrated is quite immaterial.'²

'Many doubt this last proposition, because they regard marriage as an obligatory contract, but are accustomed in such contracts to regard the place where they are made as determining the local law. The first of these two views is false, because marriage has nothing in common with the obligatory contracts. If, however, it were true, it would not lead us to the place where the marriage originated as the criterion of the local law, but rather to the place of performance. But assuredly it is only the domicile of the husband that can be the place of the performance of the duties arising from marriage.'³

'From this standpoint a number of legal questions in regard to marriage are to be examined.

'1. The conditions of the possibility of marriage, or (viewed from the other side) the impediments to marriage, are founded partly on the personal qualities of each of the two spouses separately, partly on their relation to one another. According to general principles, it may be supposed that the personal capacity of the wife is to be judged according to the law of her home. But the laws that here come into operation rest on moral considerations, and have a strictly positive nature; and therefore the hindrances to marriage which are recognized in the domicile of the husband are absolutely binding, without respect to the differences which may exist at the home of the wife, or at the place where the marriage is celebrated. This rule holds, in particular, in regard to the forbidden degrees, and the obstacles founded on religious vows.'

As a practical working rule the dual domicile doctrine is illusory, since a woman can avoid a law which forbids her to marry a particular person by acquiring a domicile prior to the marriage in a country where no such prohibition exists. One apparent object of the rule is to impose upon a woman domiciled,

(iii) ✓
Grounds
of effective-
ness

suggested by Mr. Sykes that the appropriate law to govern the essential validity of a marriage, including the capacity of the parties, is the proper law of the contract to marry, i.e. 'the law of that country with which the contract has the most real connexion'; 4 *I. & C.L.Q.* 168. Surely, this is only another way of expressing the doctrine of the intended matrimonial domicile.

¹ *Private International Law*, Guthrie's translation, s. 379, p. 240.

² But see *supra*, p. 316.

³ To the same effect see Huber, *De Conflictu Legum*, s. 10.

say, in England the English rules relating to the prohibited degrees. She is not *inter alia* to marry her uncle, though he may be domiciled in a country where the union is lawful. Such may be the design of the doctrine, but such is not necessarily the result. If the marriage is celebrated in England or in some country other than that in which the parties intend to live, i.e. at a time when she still possesses an English domicil, the object of the doctrine is achieved, for the marriage is void. But the woman, if well advised, will adopt different tactics. As we have seen, the briefest residence in a country constitutes domicil if it is intended to be permanent.¹ The emigrant acquires a New South Wales domicil the moment that he sets foot on shore at Sydney. Therefore the way of escape from an unpleasant situation open to our hypothetical Englishwoman is to marry, not in England, but in her fiancé's country. Immediately upon her arrival there with the undeniable intention of remaining there for the remainder of her married life, her English domicil will be lost and her marriage will be valid even according to the dual domicil doctrine. It is difficult to feel enthusiasm for a doctrine under which the all-important question of marital status can be affected by tactics of this description. One of the arguments advanced in its favour is that 'the incidence of status cannot be affected by the intention of the parties',² but this, though generally true, seems in the present context a little out of touch with realities. By contrast, the doctrine of the intended matrimonial home, whatever its other defects may be, is at any rate not open to evasion.

Conclusion

✓ The conclusion is that the rival claims of the two doctrines must stand or fall by the answer to the simple question—Should the law of the country where the parties live together as husband and wife in accordance with their pre-marriage intention be allowed to determine once and for all whether they possess the status of married persons? It is submitted that this purely sociological question should be answered affirmatively. Several objections of a practical nature may, no doubt, be advanced against this view. But this is true of any particular rule, for an ingenious mind can always suggest circumstances in which its application will be difficult or its operation unfair. Suppose, for instance, that the parties do not in fact establish their matrimonial home in the country intended by them at the time of the marriage. Or suppose that at the time of the marriage they have not chosen the country of their future

¹ *Supra*, p. 173.

² Dicey, p. 251.

residence. Or suppose that they change their minds after the marriage. Does the question of their status, ask the critics, remain undecided? These objections, however, largely disappear if it is remembered that in cases of doubt the *lex domicilii* of the husband at the time of the marriage must prevail. In the majority of cases it is in that domicil that the parties intend to settle and do in fact settle. In the exceptional case where they determine to make their home in the wife's domicil or in some third country, there is no practical objection to allowing the law of their chosen country to govern their status, always provided, however, that their intention is proved by convincing evidence and is in fact implemented.

Moreover, as we have seen, the question whether a marriage is void for want of capacity generally arises in a suit for nullity at a time when there is no difficulty in identifying the matrimonial domicil. The Royal Commission on Marriage and Divorce, at any rate, was not impressed by the alleged practical difficulties, for it proposed that the draft code upon the private international law of matrimonial causes should contain the following provision in the section dealing with the jurisdiction of the English court to annul a marriage alleged to be void:

Views
of the
Royal
Commis-
sion on
Marriage
and
Divorce

'If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.'¹

This proposal, by introducing an alternative test, would go a long way towards mitigating the hardships that arise under the dual domicil test.

②. The rule as deducible from the English decisions. We must now discard theory and ascertain whether there is judicial authority in England for the view that capacity to marry is governed, not by the pre-marriage *lex domicilii* of each party, but by the law of the intended matrimonial home. The relevant decisions,² it is submitted, are compatible with the view

Relevant
decisions
compatible
with doc-
trine of
matrimo-
nial
domicil

¹ Cmd. 9678, p. 395. For the commentary on this proposal see *ibid.*, at pp. 234-5.

² *Mette v. Mette* (1859), 1 Sw. & Tr. 416; *Brook v. Brook* (1861), 9 H.L.C. 193; *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1; (No. 2) (1879), 5 P.D.

that whether a marriage is void on the ground that it is definitely prohibited by one or more of the legal systems affecting the parties, must be decided in accordance with the law of the matrimonial home. It will be seen that in each case the decision would have been the same had it been squarely based upon the exclusive application of the law of the matrimonial home. Also, that in only one of the judgments is express and clear approval given to the dual domicile doctrine.¹

Brook v. Brook (1) 1861. In *Brook v. Brook*,² the case so confidently cited by those who refer capacity to the respective personal laws of the parties, the facts were these:

A marriage was celebrated in Denmark between a domiciled Englishman and his deceased wife's sister also domiciled in England, such marriage being legal by Danish law, but illegal at that date (1850) by English law.

The House of Lords held that the marriage was void, since its validity must be determined by English law which was the *lex domicilii* of the parties. We must not, however, be misled into thinking that by this the court regarded the *lex domicilii* of each party before marriage as a relevant factor. A careful reading of the speeches seems to show that English law was chosen, not because it was the *lex domicilii* of each party before marriage, but because England was the country in which they both intended to retain, and did in fact retain, their former domicils. Thus Lord Campbell stated the position as follows:

'But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the marriage depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.'³ . . .

'But I am by no means prepared to say, that the marriage now in question ought to be or would be held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the

94; *In re Bozzelli*, [1902] 1 Ch. 751; *In re De Wilton*, [1900] 2 Ch. 481; *In re Paine*, [1940] Ch. 46; *Pugh v. Pugh*, [1951] P. 482, 680.

¹ *In re Paine*, *supra*, p. 315; *infra*, p. 324.

² (1861), 9 H.L.C. 193.

³ *Ibid.*, at p. 207, *per* Lord Campbell.

country in which the parties are domiciled and *mean to reside*, the consequence seems to follow that by this law must its validity or invalidity be determined.¹

More important are the remarks which Lord Campbell made about *Warrender v. Warrender*,² for that was a case where a domiciled Scotsman had married a domiciled Englishwoman in England, with the intention, however, of establishing his matrimonial residence in Scotland. The case, which was concerned with the effectiveness of a Scottish divorce, raised no question of capacity, but the conclusion forced upon one after reading the following passage is that Lord Campbell regarded the law of the matrimonial home as the determining factor in all matters relating to marriage except formalities. He said:

Lord Campbell's view

'But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman, and *Scotland was to be the conjugal residence* of the married couple, although the law of England where the marriage was celebrated regulated the ceremonies of entering into the contract, the essentials of the contract were to be regulated by the law of Scotland. . . .'³

Decisions to the same effect as that in *Brook v. Brook* were given in the next group of cases, namely, *Sottomayor v. De Barros* (No. 1);⁴ *In re De Wilton*;⁵ and *In re Bozzelli*.⁶ In each of these cases the parties had a common pre-marriage domicile, and in each that domicile was the one in which, in accordance with the intention of the parties, the matrimonial home was established. In fact the Court of Appeal in the *Sottomayor Case* expressly said that their decision must not be relied upon as an authority for a case where the parties had different domiciles.

*Mette v. Mette*⁷ is the earliest decision on this matter in which the parties were domiciled in different countries prior to their marriage. *Mette v. Mette* (iii).

A domiciled Englishman contracted a marriage in Frankfort with his deceased wife's half-sister, a domiciled German woman. This marriage, prohibited by English law but valid by German law, was held to be void.

This decision does not conclude the controversy, since it is compatible both with the dual domicile doctrine and the doctrine of the intended matrimonial home. The man was domiciled in England until his death, both parties contemplated a matrimonial residence in England, and therefore English law, as

¹ At p. 213, *per* Lord Campbell.

² (1835), 2 Cl. & F. 488.

³ At p. 212.

⁴ (1877), 3 P.D. 1.

⁵ [1900] 2 Ch. 481.

⁶ [1902] 1 Ch. 751.

⁷ (1859), 1 Sw. & Tr. 416.

being the law of the matrimonial home, was the appropriate legal system to determine the matter. In the words of the judge, the husband 'remained domiciled in this country, and the marriage was with a view to subsequent residence in this country'. Nevertheless, although the result reached is in accord with the present submission, the *ratio decidendi* is perhaps a little doubtful. After remarking that 'there could be no valid contract unless each was competent to contract with the other', words which suggest a preference for the dual domicil doctrine, Sir Cresswell Cresswell finally concluded that since the husband had remained domiciled in England, and the marriage was with a view to subsequent residence there, the English prohibition was necessarily operative.¹

The next case on the subject is *In re Paine*, the facts of which have already been given.² Bennett J. expressly decided it on the basis of the dual domicil doctrine, but the result was exactly what it would have been had he applied the doctrine of the matrimonial home. Since England was the country where the wife was domiciled, where the man was resident before the marriage, where they intended to reside together and where in fact they resided throughout their married lives, the decision that English law must prevail could scarcely have been different.

Pugh v. Pugh

(iv) ✓

1951

The only case which has raised a question of capacity in the narrow and correct sense of the term is *Pugh v. Pugh*,³ where the facts were these:

A British officer, domiciled in England but stationed in Austria, married a Hungarian girl in Austria in 1946. The girl, whose domicil of origin was Hungarian, had gone to Austria with her parents to escape from the Russian advance. She was only fifteen years of age and therefore, if her capacity was to be governed by English domestic law, the marriage was rendered void by the Age of Marriage Act which prohibits a marriage 'between persons either of whom is under the age of sixteen'. By both Hungarian and Austrian law the marriage was valid.

The wife submitted that the marriage was void for want of capacity, first because the husband was a British subject with

¹ 1 Sw. & Tr. at pp. 423, 424.

² [1940] Ch. 46, *supra*, p. 315. This decision is at first sight difficult to reconcile with that of Romer J. in *re Bischoffsheim v. Bischoffsheim*, [1948] Ch. 79, *infra*, p. 421, where, however, the question of the legitimacy of the children was held not to depend upon the validity of their parents' marriage.

³ [1951] P. 482.

an English domicil and therefore bound by the Act; secondly and alternatively, because the essential validity of the marriage was determinable by English law as being either the *lex domicilii* of the husband or the law of the country of the proposed matrimonial home. Pearce J. granted a decree of nullity, holding that the wife was entitled to succeed on both submissions. The Act, he said, was intended to affect 'all persons domiciled in the United Kingdom wherever the marriage might be celebrated'.¹ He also agreed with the second submission, 'since by the law of the husband's domicil it was a marriage into which he could not lawfully enter'.² This passage, coupled with the citation of *In re Paine*,³ undoubtedly suggests that the learned judge applied English law as being the *lex domicilii* of the husband before marriage, but the fact remains that the decision is compatible with the doctrine of the intended matrimonial domicil.

'At all the material times it was the husband's intention after his service abroad to settle down with his wife in England. On October 10th, 1948, a child was born. In June, 1950, they paid a short visit to England, and in October, 1950, they came to England permanently.'⁴

It may be objected with force that none of these decisions is conclusive in favour of the law of the matrimonial home, since each one is open to the construction that the *lex domicilii* referred to was the *lex domicilii* of each party. In fact it must be admitted that in *In re Paine* the judge did not address his mind to the future matrimonial home, but applied English law as being the *lex domicilii* of the woman prior to her marriage. Nevertheless there remains one decision which, on the facts though not on the reasoning, is a more convincing authority for the view now being advocated. This is *Sottomayor v. De Barros* (No. 2),⁵ where

*Sottomayor
v. De Barros
(No. 2)*

(v).
1879.

Back a domiciled Englishman married in England his first cousin, a domiciled Portuguese. The law of Portugal prohibited a marriage between first cousins in the absence of a Papal dispensation.

Valid
Marriage

If it is true to say that a marriage is invalid where either party is incapacitated by his or her personal law, the decision in this case should have been adverse to the legality of the union, but Sir James Hannen held that it constituted a valid marriage. It

¹ [1951] P. 493.

² Ibid., at p. 494.

³ *Supra*, p. 315.

⁴ [1951] P., at pp. 482-3.

⁵ (1879), 5 P.D. 94. See also *Ogden v. Ogden* [1908] P. 46.

must be admitted that he did not base his decision upon the matrimonial residence of the parties in England, but upon the fact that the *lex loci celebrationis* was English. Impressed by the 'injustice which might be caused to our own subjects if a marriage were declared invalid on the ground that it was forbidden by the law of the domicil of one of the parties',¹ he refused to give effect to the prohibition imposed upon the wife by Portuguese law. The decision has never been overruled. How, then, is it to be rendered compatible with the dual domicil doctrine? The difficulty is usually surmounted by framing an exception to that doctrine. It is stated as follows in the leading text-book:

'The validity of a marriage celebrated in England between persons of whom one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England.'²

In other words, capacity must be tested by the *lex domicilii* of each party, but when one of them has an English domicil a foreign incapacity affecting the other and unknown to English law must be utterly disregarded if the marriage takes place in England. This suggested rule has been stigmatized as 'unworthy of a place in a respectable system of the conflict of Law'.³ What is equally true is that it makes nonsense of the dual domicil doctrine.

What is
the effect
of the de-
cisions?

What, then, is the effect of these authorities? We have seen that in each one it was a matter of indifference to the actual result which of the two rival doctrines was applied, but that in *Brook v. Brook* before the House of Lords the doctrine of the matrimonial home may have been the basis of the decision.⁴ Which of these doctrines represents the law? We have suggested various reasons for preferring the latter, but that is of little consequence compared with the interpretation that the Court of Appeal is likely to put upon the decisions.

So-called
incapacities
raise the
question of
essential
validity

Before attempting this forecast, it will be helpful to analyse the nature of the so-called incapacities that have occupied the attention of the courts, for this will disclose the particular aspect of the marriage contract that is affected and the proper

¹ *Ibid.*, at p. 104.

² Dicey, p. 264. In addition to *Sottomayor v. De Barros* (No. 2) (1879), 5 P.D. 94, the exception is supported by dicta, *Chetti v. Chetti*, [1909] P. 67, 81-88; *Ogden v. Ogden*, [1908] P. 46, 74-77.

³ Falconbridge, *Conflict of Laws*, p. 711.

⁴ *Supra*, p. 322.

law to which they are subject. All the relevant cases, except *Pugh v. Pugh*, have been concerned with prohibited marriages, and in the present account they have been discussed on the basis of capacity. Foote was of opinion that 'the only logical incapacities which exist in English law are those occasioned by infancy and insanity',¹ and he expressed the view, shared by the Court of Appeal,² that it is a misuse of language to regard the universal prohibition of an act as the imposition of an incapacity. He illustrated his view as follows:

'Where a deprivation or a prohibition is general in its effect, it imposes no incapacity upon any one. It does, however, occasionally happen that a prohibition, which is in reality universal, is apparently particular; and that a man is prohibited from a complex act which seems at first sight to be one permissible to others. For example, *A* (before the Act of 1907) wished to marry *B*, his deceased wife's sister, but the English law prohibited him from doing so. Inasmuch as *C*, *D*, *E*, &c., might marry *B*, if they and she liked, *A* may be said, in a certain loose sense of the term, to have been incapacitated by English law from that act. Strictly speaking, this is incorrect. Marriage with a deceased wife's sister, the act in *A*'s mind, was *universally* prohibited by English law, and neither *A* nor anybody else might do it. It is true that any other man not similarly related to her might marry *B*, but if any other man married her, he would not be doing that prohibited act which *A* desired to do. *A*'s capacity, therefore, was not in any way affected by the prohibition.'³

If this view is correct, as it appears to be,⁴ the so-called relative incapacities affect the legality or the essential validity of a marriage, and it was on this footing that the House of Lords decided *Brook v. Brook*. In that case Lord Campbell expressly said that his opinion did 'not rest on the notion of any personal incapacity to contract such a marriage', but 'on the ground of the marriage being prohibited in England as contrary to God's law';⁵ and in none of the speeches does the word 'capacity' once occur. Indeed, even if Foote's analysis is unsound, it seems obvious that capacity can only be classified as going to the essence of the marriage contract. In any event, therefore, the law that governs the essential validity of a marriage must also govern *inter alia* the question whether a marriage between *X* and *Y* is permissible, for it can scarcely

¹ *Private International Law* (5th ed.), p. 383.

² *Ogden v. Ogden*, [1908] P. 46, at p. 74.

³ *Private International Law*, p. 100.

⁴ But see *contra*, 46 *L.Q.R.* 305, note 100.

⁵ (1861) 9 H.L.C. 193, 214.

be the case that certain elements of essential validity are governed by one law, but others by a different law.

What law
governs
essential
validity?

Thus the question canvassed in the present discussion may be stated perhaps more accurately by asking—What law governs the essential validity of a marriage? The answer, no doubt, is the law of the domicile, but as we have suggested it is not certain whether this refers to the matrimonial domicile or to the domicile of each party before marriage. Foote himself felt no doubt. 'Inasmuch as the wife's domicile becomes the husband's upon the marriage, it is the law of his domicile, not hers, which must in all cases be looked to. This appears a necessary conclusion, but there is no express decision.'¹ There is still no explicit decision, but there are judicial pronouncements of high authority in recent years which refer the legality or illegality of a marriage to the law of the matrimonial domicile.

Lord
Greene

In the first of these, *De Reneville v. De Reneville*,² the Court of Appeal held that the essential validity of a marriage between a woman domiciled in England and a man domiciled in France, the parties having spent their married lives in French territory, fell to be governed by French law. If French law was chosen as being the law of the matrimonial home, the decision goes a long way towards supporting the contention put forward in these pages. The wife had petitioned the English court for a decree of nullity on the ground of the impotence of her husband, and in the passage that follows Lord Greene was concerned to ascertain the law that determined whether the alleged defect of impotence rendered the marriage void or voidable. He said:

'In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this³ is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my

¹ *Private International Law* (5th ed.), p. 384, note p. The summary appended to the 4th edition, which did not appear in the later edition, put the matter thus at p. 567:

'In the contract of marriage, the question, strictly speaking, is generally not one of the capacity or incapacity of the parties, but of the legality or illegality of the marriage.

'The law of the matrimonial domicile is the proper law to decide whether the marriage can, by the use of any forms, ceremonies or preliminaries, be effected.'

² [1947] P. 100. See also a similar statement by Bucknill L.J. in *Casey v. Casey*, [1949] P. 420, at pp. 429-30.

³ i.e. the effect on the marriage of the impotence of one of the parties, see *infra*, pp. 374-5.

opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.¹

The second judgment which shows a similar trend is that of Denning L.J. in *Kenward v. Kenward*,² where he affirmed with no ambiguity that the 'substantial validity' of a marriage contracted between persons domiciled in different countries is governed by the law of the country where they intend to live and on the basis of which they have agreed to marry. Denning L.J.

The justifiable inference, therefore, subject to what is said in the subsequent paragraphs of this section, is that if the Court of Appeal has occasion to determine the capacity for inter-marriage of parties domiciled in different countries, it will prefer the reasoning of Lord Campbell³ and will assign the question to the law of the intended matrimonial home. Conclusion

It must be admitted, however, that the Marriage (Enabling) Act, 1960, which modifies the former rules of affinity and which, perhaps, is the most startling enactment from a sociological point of view that has been passed for many years, has made it infinitely more difficult for the court to arrive at this conclusion although the case is one to which the Act does not apply. Marriage (Enabling) Act, 1960

It has long been the rule that after the death of his wife a man may marry her sister, aunt or niece; and may also marry the wife of his brother, uncle or nephew after her husband is dead. The Act of 1960 has now eliminated the condition that the wife, brother, uncle or nephew must be dead at the time of the proposed marriage.⁴ Thus, for example, it is now permissible for a man to marry the sister of his divorced wife. Changes English internal law

Having made this change in English internal law, the Act lays down a rule for the choice of law by providing that no such marriage shall be valid 'if either party to it is at the time of the marriage domiciled in a country outside Great Britain, and under the law of that country there cannot be a valid Contains a rule for the choice of law

¹ [1948] P. 100, at p. 114. See also Bucknill L.J. at pp. 121-2. In *Ponticelli v. Ponticelli*, [1958] P. 204, at p. 214, Sachs J. assumed that the personal capacity of a spouse is governed by 'the *lex domicilii* which normally coincides with the law pertaining to the country of the husband's domicile at the time of the marriage'.

² [1951] P. 124, 143-6; *supra*, pp. 313-14, for a full citation of his view.

³ *Supra*, p. 323.

⁴ Marriage (Enabling) Act, 1960, s. 1 (1).

marriage between the parties'.¹ This rule, of course, is not of general application, but it embraces many of the so-called incapacities that occur in practice and it cannot fail to influence decisions upon others that may occur. If, for instance, a woman domiciled in England were to marry her father's brother, domiciled in a country where such a marriage is permissible, and if the parties were to establish their home in that country, it would be more difficult than formerly for an English judge to ignore the incapacity to which the wife was subject in her pre-marriage domicile.

General
effect of the
Act
uncertain

Nevertheless, it is going a little far to suppose that an admittedly controversial problem has been finally resolved for every type of incapacity by a sub-section that was never even mentioned, much less debated, in the course of its passage through parliament.² The criticism of the dual domicile theory, therefore, is still retained in these pages in the hope, optimistic though it may be, that the legislature will ultimately decide to clarify the private international law relating to matrimonial causes and to capacity on the general lines unanimously suggested by the Royal Commission on Marriage and Divorce.³

III. FORMALITIES OF MARRIAGE⁴

Formal
validity
depends
solely upon
*lex loci
celebrationis*

There is no rule more firmly established in private international law than that which applies the maxim *locus regit actum* to the formalities of a marriage. Whether any particular ceremony constitutes marriage depends solely upon the law of the country where the ceremony takes place.⁵ The absolute nature of both the positive and negative aspects of this principle has frequently been stressed by the courts. 'Every marriage

¹ Marriage (Enabling) Act, 1960, s. 1 (3).

² The only debate was in the House of Lords on 26 January 1960, and it was confined to the change made in English internal law by s. 1 (1); H.L. Debates, vol. 220, pp. 652-95. At its second reading in the Commons on 25 March 1960 it was referred to committee for consideration on 8 April. On that date it was considered in committee and passed. If it was seriously considered in committee, the Stationery Office has not thought fit to publish the proceedings.

³ Cmd. 9678, Part xii.

⁴ See 7 I. & C.L.Q. 217-61 (Mendes da Costa).

⁵ *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395; *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 530; *Harvey v. Farnie* (1882), 8 App. Cas. 43, 50; *Berthiaume v. Dastous*, [1930] A.C. 79 (P.C.); *Kenward v. Kenward*, [1951] P. 124. As to the method of proving a foreign marriage in English proceedings, see the Practice Direction in 1955, 1 W.L.R. 668.

must be tried according to the law of the country in which it took place,'¹ and if it is good by that law, then, so far as its formal validity alone is concerned 'it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses.'² The reverse is equally true. 'If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.'³

The first case to establish this principle in England was *Scrimshire v. Scrimshire*⁴ in 1752, where the facts were as follows:

(1) - 1752 - Facts - Two British subjects, both domiciled in England, married each other in France. The husband was eighteen, the wife fifteen, years of age; the marriage was clandestine and by French law absolutely void, but was valid by English law unless avoided as the result of legal proceedings. The marriage was annulled by a French court. The wife later brought a suit for restitution of conjugal rights. It thus became necessary to decide whether there was a subsisting marriage or not, and this, of course, depended upon whether the legal effect of the ceremony was to be determined by French or by English law.

It was urged that, since both parties were British subjects domiciled in England, the law of France had no claim to be considered. The judge of the Consistory Court, Sir Edward Simpson, stressed the confusion that would ensue if this argument were to be accepted.

'All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, succession and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are made.'⁵

In the case of a marriage by proxy, the relevant *locus celebrationis* is the place in which the proxy takes part in the formal marriages

¹ *Herbert (Lady) v. Herbert (Lord)* (1819), 3 Phill. Ecc. 58, 63, per Sir William Scott.

² *Berthiaume v. Dastous*, [1930] A.C. 79, 83, per Lord Dunedin.

³ *Ibid.* ⁴ (1752), 2 Hag. Con. 395.

⁵ At p. 417.

ceremony by virtue of the authority conferred upon him by the absent party.¹ Thus, if a woman, domiciled and resident in England, executes a power of attorney appointing *X* to act as her representative in the celebration of a marriage between her and *Y* in a country where marriage by proxy is recognized, and the ceremony is in fact performed, the formal validity of the marriage cannot be impugned. The question whether a deputy is permissible concerns the formal, not the essential, validity of a marriage. A marriage ceremony solemnized in such a manner is not contrary to English public policy.²

Retro-
spective
validation
of
marriage
If a marriage which is formally void because solemnized by a defective ceremony is later validated by the *lex loci celebrationis*, it will be recognized as valid in England. This position arose in *Starkowski v. A.-G.*³ where the facts were as follows: (ii).

1958
CW
Fact
In May, 1945, *H* and *W*, both domiciled in Poland, went through a ceremony of marriage in a Roman Catholic church in Austria, though at that time Austrian law required a civil ceremony in accordance with the German Marriage Law of 1938. In June, 1945, after the expulsion of the Germans, a special law was passed providing that such religious marriages should be retrospectively validated if they were registered in the appropriate public register. The ceremony between *H* and *W* was duly registered, though without the knowledge of *W*.

H and *W* came to England in 1946, acquired an English domicile⁴ and *W* formed a connexion with *X* by whom she had a child. In 1950 she and *X* went through a ceremony of marriage at Croydon.

The question was whether the Austrian marriage was valid and subsisting at the time of the Croydon ceremony, for if so there was no subsequent marriage with *X* that would suffice to legitimate their child.

It was argued on behalf of the child that the validity of a marriage must be tested according to the relevant law at the time of the ceremony; further, that foreign retrospective legislation is repugnant to English public policy and that to recognize the Austrian validating law in the instant circumstances would be to alter the status of a person domiciled in England. Despite these weighty arguments, the House of Lords held the Austrian marriage to be valid and the child

¹ *Apt v. Apt*, [1947] P. 127; aff. [1948] 83; *Ponticelli v. Ponticelli*, [1958] P. 204.

² *Apt v. Apt*, *supra*.

³ [1954] A.C. 155; compare *Pilinski v. Pilinska*, [1955] 1 W.L.R. 329. See 3 *J. & C.L.Q.* 353.

⁴ In the case of the wife, this finding was on the assumption that she was a *feme sole*.

born to *W* and *X* to be illegitimate, though their Lordships expressly refrained from suggesting what their decision would have been had the English marriage been concluded before the Austrian legislation or before the registration. Adverting to the governing principle—*locus regit actum*—Lord Asquith said:

‘I can see no material distinction in this regard between the observance, as between the parties, of formalities which suffice to make a marriage valid *ab initio* according to the local law, and of formalities which are not so sufficient but the insufficiency of which is (almost immediately in this case) repaired by a validating Act of the local legislature.’¹

This reasoning, no doubt, is logical, but its result is that the parties to a marriage void according to the law of the place where it is celebrated may not be safe in assuming that their unmarried status is secure. Should not the function of a *lex loci celebrationis*, foreign to the *lex domicilii* of the parties, cease at the moment when the ceremony, whether effective or abortive, is concluded?²

This principle, that a marriage which is in accordance with the formalities of the *lex loci celebrationis* is to be regarded as formally valid everywhere, even though it would have been void if solemnized in that manner in the country where one or both of the parties are domiciled, is generally but not universally accepted. Thus in those countries where status depends upon religious law, as in Yugoslavia and Greece for persons of the Orthodox faith, in Malta for Roman Catholics, and in Cyprus for Moslems and members of the Orthodox Church, a marriage contracted in disregard of the religious formalities of the domicile, no matter where solemnized, is not recognized as valid. For instance, a civil marriage contracted in London by a Roman Catholic domiciled in Malta is not recognized by Maltese law. It is clear, however, by English law that foreign views of this nature do not disturb the application of the maxim—*locus regit actum*. In practice the parties avoid the unfortunate situation that arises from this conflict of laws by the performance of two separate ceremonies, one according to the local forms, the other according to the religious requirements.

So imperative is it that the *lex loci celebrationis* should alone determine whether the formalities of a marriage are sufficient, that no exception is made to the principle even where the sole object of the parties in marrying in a foreign country has been

Predominance of *lex loci celebrationis* not admitted in all countries

Lex loci governs even though formalities of *lex domicilii* evaded

¹ At p. 177.

² 7 *I. & C.L.Q.* 251–60 (Mendes da Costa).

to evade some troublesome formal requirement of their *lex domicilii*.¹ The leading authority upon the matter is *Simonin v. Mallac*.²

Two domiciled French persons contracted a marriage in London which, though valid according to English law, would have been void if tested by French law, since the parental consent required by the Code Napoléon had not been obtained. The wife later petitioned for a decree of nullity of marriage.

The court dismissed the petition, for since the necessary consent, as we have seen,³ was a formality required by French law and nothing more, its absence could not affect a marriage contracted in England. The Judge Ordinary, in delivering the unanimous judgment of the court, could discover no judicial decision or dictum, no opinion among writers of authority, which controverted the principle that in all circumstances the law of the country where a marriage is solemnized shall alone govern its formal validity. So the fact that a person is disabled by his foreign *lex domicilii* from marrying otherwise than in accordance with the formalities of that law will not be held by the English courts to invalidate a marriage contracted by him in England according to English law.⁴

Exceptions
to the
principle
*locus regit
actum*

There are, however, certain exceptional cases in which English law recognizes the validity of a marriage, notwithstanding a failure to observe the formalities of the *lex loci celebrationis*. These exceptions to the general principle may be grouped as follows.

(i) Marriages under the Foreign Marriage Acts, (1892 to 1947).

Foreign
Marriage
Act

The Foreign Marriage Act, 1892, provides that a marriage between parties, one of whom at least is a British subject,⁵ solemnized before a 'marriage officer' in a foreign country in the manner prescribed by the Act, shall be as valid as if it had been solemnized in the United Kingdom with a due observance of all forms required by law.⁶ The persons who may be appointed marriage officers include British Ambassadors, Governors, High Commissioners, and Consuls.⁷

¹ The *Gretna Green Cases*, *supra*, p. 56, note 3.

² (1860), 2 Sw. & Tr. 67.

³ *Supra*, p. 56.

⁴ *Papadopoulos v. Papadopoulos*, [1930] P. 55; *Chetti v. Chetti*, [1909] P. 67.

⁵ The Act, therefore, does not extend to a British-protected person, e.g. natives of British protectorates; of protected States; of Indian States; or of mandated territories.

⁶ S. 1.

⁷ S. 11.

It is essential that one at least of the parties should reside for a minimum period of one week within the district of the marriage officer by or before whom the ceremony is to be solemnized, and also that after this period of residence a notice containing certain particulars should be given to the officer.¹ If only one party has satisfied this condition of residence, the other must give a notice in the same terms to the appropriate officer in the place where he or she has dwelt.² The notice must be posted up by the marriage officer in some conspicuous place during fourteen consecutive days, at the end of which period, if no caveat has been lodged, the marriage may be solemnized.³

Every marriage must be solemnized at the official house of the marriage officer, with open doors, in the presence of two or more witnesses. The ceremony, which may be performed either by the marriage officer or by some other person in his presence, may be according to the rites of the Church of England or in such other form as the parties see fit to adopt.⁴ If, however, the rites of the Church of England are not observed, each party must make at some stage of the ceremony the following declaration:

'I call upon these persons here present to witness, that I, *AB*, take thee, *CD*, to be my lawful wedded wife (or husband).'⁵

A marriage contracted under these statutory provisions is necessarily valid in England from the point of view of form, though it may be void under the law of the country where it took place.⁶ If, however, it is annulled in the country of the common domicil of the parties, the decree of nullity is effective in England.⁷

Regulations have, however, been made by Order in Council, in order to minimize the risk of a marriage being void in the foreign country and valid in England.⁸ Thus a marriage officer is forbidden to perform a marriage that will be invalid by the local law of the foreign country unless he is satisfied that

¹ S. 2. The particulars are the name, surname, age, profession, condition and residence of each party.

² Foreign Marriages Order in Council, S.R. & O., 1913, No. 1270, Arts. 7-14, as varied by S.R. & O., 1925, No. 92, Art. 1, and by S.R. & O., 1933, No. 975, Art. 1.

³ Foreign Marriage Act, 1892, ss. 3, 5.

⁴ *Ibid.*, s. 8 (2).

⁵ *Ibid.*, s. 8 (3).

⁶ *Hay v. Northcote*, [1900] 2 Ch. 262.

⁷ *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Galene v. Galene*, [1939] P. 237; *infra*, p. 381.

⁸ S.R. & O. 1913, No. 1270, Arts. 1, 2.

both parties are British subjects, or, if one only is a British subject, that the other is not a citizen of that country. If such other party is a citizen of the foreign country, the marriage officer must satisfy himself that there are not sufficient local facilities for celebrating the marriage, or, if the citizen is the woman, that the national authorities will not object to the marriage. Again, where the woman about to be married is a British subject and the man an alien, the marriage officer, before allowing the ceremony, must satisfy himself:

- (a) that the marriage will be recognized by the law of the foreign country to which the man belongs; or
- (b) that some other and additional marriage ceremony, recognized by the law of the country to which the man belongs, has taken place or is about to take place between the parties; or
- (c) that the leave of the Secretary of State has been obtained.

Naval,
military,
and air
force mar-
riages
solemnized
abroad

A common view held at the beginning of the nineteenth century was that the British army serving abroad carried English law with it and that a member of the forces might marry without complying with the local forms.¹ Doubts concerning the validity of such marriages having arisen, a statute was passed in 1823 which provided that 'marriages solemnized within the British lines' should be deemed to be as valid in law as if solemnized within His Majesty's dominions with a due observance of all forms required by law.² This statute was repealed but substantially re-enacted by the Foreign Marriage Act of 1892, which in section 22 validated marriages solemnized within the lines by a person 'officiating under the orders of the commanding officer of a British army serving abroad'. This section caused difficulty in two respects.³ First, it was doubtful whether marriages were valid that had in fact been frequently solemnized on land by persons officiating under the orders of naval and air force officers. Secondly, the exact meaning of the expression 'British lines' was far from clear. Would it include, for instance, an area remote from the main body of the army in which a small body of troops was stationed? The section, therefore, has now been replaced by the Act of 1947.

The first difficulty has been removed by the enactment that, as respects marriages solemnized before 1 January 1948,

¹ *R. v. Brampton* (1808), 1 East 282; *Ruding v. Smith* (1821), 2 Hag. Con. 371.

² 4 Geo. 4, c. 91, s. 1.

³ 25 *B.Y.B.I.L.* 390.

section 22 shall be deemed to have had effect as if the words 'British army' included naval and air forces and as if 'British lines' extended to any place at which any part of the military, naval or air forces serving abroad was stationed.¹

Next, section 22 is replaced for the future by the following enactment which, it will be noticed, substitutes the expression 'any foreign territory' for 'British lines':

'A marriage solemnized in any foreign territory by a chaplain serving with any part of the naval, military, or air forces of His Majesty serving in that territory or by a person authorized . . . by the commanding officer of any part of those forces serving in that territory shall, subject as hereinafter provided, be as valid in law as if the marriage had been solemnized in the United Kingdom with a due observance of all forms required by law:

Provided that this subsection shall only apply if—

- (a) one at least of the parties to the marriage is a member of the said forces serving in that territory or a person employed in that territory in such other capacity as may be prescribed by Order in Council; and
- (b) such other conditions as may be so prescribed are complied with.²

'Foreign territory' includes, *inter alia*, ships which are for the time being in the waters of any foreign territory.³ A marriage celebrated under the Act is valid whether the armed forces are on active service or merely in the occupation of foreign territory after the successful conclusion of hostilities.⁴

A question might arise whether an English court will recognize the validity of a marriage celebrated within the lines of a foreign army while in occupation of another country. This will depend upon whether the law of the country to which the army belongs accepts the doctrine of the 'lines' marriage for its national troops.⁵ If so, a marriage satisfying the requirements of the doctrine, whatever they may be, ought to be upheld in England.

Marriage within lines of foreign army

The Act of 1892, other than section 22, is concerned with marriages solemnized abroad *in the English form* between parties, at least one of whom is a British subject. It is not

Certificate of no impediment generally required by *lex loci*

¹ Foreign Marriage Act, 1947, s. 1 (1)

² *Ibid.*, s. 2. For Orders in Council made under the Act see S.R. & O. 1947, No. 2875, amended by 1949, No. 1235, and partly superseded by Service Departments Registers Order, s. 9, 1959, No. 406.

³ S. 2 (3).

⁴ *Burn v. Farrar* (1819), 2 Hag. Con. 369. By Order in Council the statutory provisions are available to members of the control service in Germany.

⁵ *Taczanowska v. Taczanowski*, [1957] P. 301, 312, *per* Karminski J.

concerned with a marriage solemnized abroad *in the local form* between two British subjects or between a British subject and a foreigner. Yet statutory intervention in such a case is desirable, for, though a marriage contracted abroad in the local form is regarded by English law as formally valid, most foreign governments require a non-national, who desires to marry a national according to the *lex loci*, to produce a certificate of no impediment. The object is to ensure that the marriage will be regarded as valid in all respects by the legal system to which the non-national is subject.

Nulla osta
certificate

The English authorities have for many years, though without statutory authority, met the requirement by issuing certificates that have proved satisfactory to the various countries concerned. The certificates vary slightly in form according to the requirements of the country in question, but a typical example is the *nulla osta* certificate granted to a British subject who proposes to marry in Italy in the Italian form. It is issued by a British consular officer and it reads as follows:

'AB and CD, having fulfilled the formalities required by British law, as if their marriage were to be solemnized under that law, I, His Majesty's Consul at Bordighera, upon the evidence before me, hereby certify that no legal impediment to their marriage has been shewn to me to exist.

Given at H.M.'s Consulate,
this day of .'

At least twelve other countries accept certificates couched in the same terms. The formalities upon which the issue of a certificate depend are simple. Notice of the intended marriage must be given to the consul or other marriage officer at the place of residence of the British subject or subjects, and must remain posted up there for a given period.¹ The certificate is granted at the end of this period, provided that no caveat has been entered, and provided that the parties have affirmed on oath that they know of no impediment to the marriage.

Certificat
de coutume

A different and more comprehensive type of certificate,

¹ If the marriage is between two British subjects each party must give notice at the place of his or her residence; one week's residence is sufficient; the notice must remain posted up for fourteen days. These requirements follow the regulations made under the Foreign Marriage Act, 1892. If the marriage is between a British subject and a foreigner three weeks' residence is required, and the notice must remain posted up for three weeks. These longer periods have been taken from the Marriage with Foreigners Act, 1906, which, though in fact abortive, is intended to regulate a marriage between a British subject and a foreigner.

generally called a *certificat de coutume*, is issued when the marriage is to be solemnized in France, Belgium, Switzerland or Argentina. In the case of France, for instance, it states that a British subject of the age of twenty-one years may marry without parental or any other consent, and that publication of banns is not required for the marriage of a British subject outside British territory.

At the beginning of the present century it was felt that the time had come to put the grant of certificates of no impediment upon a statutory basis, and an attempt to settle this, as well as other cognate matters, was made by the Marriage with Foreigners Act, 1906.¹ This Act is curiously limited in scope, since it is confined to the case of a marriage between a British subject and a foreigner, and does not extend to the equally common case of a marriage abroad between two British subjects. It provides that a British subject who desires to be married in a foreign country to a foreigner according to the law of that country may give notice of the intended marriage, if resident in the United Kingdom to the Registrar, and if resident abroad to the marriage officer. Application may then be made for a certificate of no impediment that will comply with the requirements of the *lex loci*. It also provides that the forms and regulations appropriate for this purpose shall be settled by Order in Council. In fact, however, the Act has proved completely sterile, for no Order in Council has been made. This failure is due, partly to certain defects in the statutory provisions themselves, and partly to the somewhat rigid manner in which these provisions have been interpreted by the authorities concerned with the drafting of the Order in Council. Matters having thus reached a deadlock, the Lord Chancellor set up a committee in 1938 to consider this and certain other questions connected with foreign marriages. The committee was instructed *inter alia* to consider:

Marriage
with
Foreigners
Act, 1906

The form and procedure for the granting of consular certificates of no impediment by British Consuls for the marriage of British subjects or British protected persons by the local law of foreign countries, when such certificates are required by that law, with particular reference to the Marriage with Foreigners Act, 1906.

Unfortunately, however, the deliberations of the committee were brought to an abrupt termination at an early stage by the outbreak of war in 1939.

¹ Sections 1, 3, 4, and schedule.

(ii) Marriages in a place where there is no local law available.

Cases
where
marriage
void by
lex loci
recognized
if valid at
common
law

It has been admitted for nearly two hundred years that there may be peculiar circumstances which allow a marriage, not solemnized according to the *lex loci celebrationis*, to be granted validity if it satisfies the forms required by the common law of England. What these circumstances are has never been very precisely defined, but the earlier authorities require, first, that the parties should be British subjects or, *semble*, domiciled in England; secondly, that their observance of the local forms was prevented by some insuperable difficulty. This second essential, vague in the extreme, has been expressed in various ways. Lord Stowell considered that 'legal or religious difficulties' might justify a relaxation of the principle *locus regit actum*,¹ while Lord Eldon was clear that the parties might fall back on the common law if they could not avail themselves of the *lex loci* or if there was no *lex loci*.² Story, relying upon the English authorities,³ was more forthcoming. He said:

The exception to the general rule 'has been deemed to arise in cases of a sort of moral necessity, and it has been held to apply to persons residing in foreign factories, in conquered places, and in desert or barbarous countries, or in countries of an opposite religion, who are therefore permitted from necessity to contract marriage there according to the laws of their own country.'⁴

According to a modern judicial view the two categories of case in which the English courts are prepared to apply the common law are where a member of a conquering army is married in the conquered country⁵ and where the parties are, in effect, so marooned that there are no local formalities with which they can reasonably comply.

'This [second] category covers, for instance, areas in which no set of formalities has ever existed, areas where chaos has so supervened that conformity is a matter of insuperable difficulty, and areas where conformity would go contrary to the conscience.'⁶

What
constitutes
a marriage
at common
law

Admitting, then, that in certain circumstances parties may marry abroad according to the forms of their own law, the next

¹ *Ruding v. Smith* (1821), 2 Hag. Con. 371, 391. See *Harford v. Morris* (1776), 2 Hag. Con. 423.

² *Cruise, Dignities*, 276.

³ *Ruding v. Smith*, *supra*; *Latour v. Teesdale* (1816), 8 Taunt. 830; *R. v. Brampton* (1808), 10 East 282.

⁴ *Conflict of Laws*, s. 118.

⁵ *Infra*, p. 344.

⁶ *Kochanski v. Kochanska*, [1958] P. 147, at pp. 151-2, *per* Sachs J.

problem is to ascertain what constitutes a marriage at common law. The marriage statutes of the United Kingdom do not, of course, apply to such a case, and the two questions that require an answer are:

- (a) What formalities does common law require for a marriage contracted in England?
- (b) Must all these requirements be observed in the case of a marriage abroad?

With regard to the first question, one essential undoubtedly is that the parties should take each other for man and wife. Another, that an episcopally ordained priest or deacon, whether of the English or Catholic Church, should take part in the ceremony. This last point was decided by the House of Lords in *R. v. Millis*,¹ where it was held, though in a rather unsatisfactory manner,² that a marriage celebrated in Ireland by a Presbyterian minister according to the rites of the Presbyterian Church was invalid. Lord Hardwicke's Act did not extend to Ireland, and therefore marriages in that country were governed by the common law. The rule was thus established that no common law marriage is valid without the intervention of an ordained priest. It is a rule that almost certainly lacks historical justification,³ but its applicability to English common law marriages cannot now be doubted.

¹ (1843-4), 10 Cl. & F. 534.

² The four judges of the Irish Court of Queen's Bench were equally divided, and Perrin J., who had held the marriage valid, formally withdrew his judgment in order that an appeal might be taken to the House of Lords. The case was there argued before six Law Lords and ten judges. A unanimous opinion of all the judges in favour of the invalidity of the marriage was read by Tindal C.J., who explained, however, that lack of time had prevented a proper investigation of the case. He said that there had been much difference of opinion and that some of his brethren had felt great difficulty in subscribing to the opinion. The Law Lords were equally divided, and so according to a merely technical rule—*semper praesumitur pro negante*—a most important principle was added to the marriage law of England.

³ Before Lord Hardwicke's Act the practice of the ecclesiastical Courts constituted the marriage law of England. These Courts applied canon law. Before the Decree of the Council of Trent (1545-63) the general canon law of Europe recognized a contract of marriage *per verba de praesenti*, and, since the Decree was never in force in England, it is important to trace the origin of the idea that an English marriage required the presence of a priest. It appears to have originated in a law of the Saxon king, Edmund, of the year 940, to the effect that: 'At nuptials there shall be a mass priest by law who shall by God's blessing bind their union to all posterity.' This was followed by a number of constitutions of bishops and archbishops to the same effect, especially one of Archbishop Lanfranc in 1076. Such constitutions could not create law, and Edmund's decree must have ceased

Does the
common
law in its
totality
apply
abroad?

The second question is whether the rule in *R. v. Millis* applies to marriages abroad. We must ascertain whether a marriage abroad, in some place where there is no local law available or where the local form is of a non-Christian nature, is formally valid on the ground alone that the parties have taken each other for man and wife, or whether in addition its validity requires the presence of an ordained priest. In other words, how much of the common law affects a British subject in some country outside England? This question of constitutional law has frequently arisen with regard to the early British settlers who carried English law with them to the colonies, and the principle according to which it must be answered is well established, namely, that only so much of the law is imported into the colony as is suitable to the local conditions.¹ Thus it was held under the old law that the English Statute of Mortmain,² since it represented a law of local policy adapted solely to this country, did not extend to the Island of Grenada in the West Indies.³ Tested by this principle, it seems clear that the rule of the common law requiring the intervention of an ordained priest could scarcely be extended to a marriage contracted in a colony during the early days of the colonization when there was no Church establishment and no division of the country into parishes.⁴

Authority
is adverse
to extra-
territorial
application
of this rule

The weight of judicial opinion was for many years in favour of treating the rule in *R. v. Millis* as being confined to marriages in England and Ireland,⁵ and in *Catterall v. Catterall*⁶ Dr. Lushington held that a marriage which had been celebrated at Sydney in 1835 by a Presbyterian minister was valid at common law. He said:

‘Were I to hold the presence of a priest in the orders of the Church to be law by at any rate the thirteenth century, for after Church and State had been separated by William I the general canon law of Europe was recognized as prevailing in England. The majority of canonists and historians consider the decision in *R. v. Millis* to be wrong.

¹ Blackstone, i. 100.

² 9 Geo. II, c. 1, now repealed by the Charities Act, 1960, s. 38.

³ *A.-G. v. Stewart* (1817), 2 Mer. 143; *Whicker v. Hume* (1858), 7 H.L.C. 124.

⁴ *Maclean v. Cristall* (1849), Perry’s Oriental Cases, 75.

⁵ *Beamish v. Beamish* (1861), 9 H.L.C. 274, 348, 352; *Lightbody v. West* (1903), 18 T.L.R. 526.

⁶ (1847), 1 Rob. Ecc. 580. There was in fact a local marriage statute which had not been observed, but Dr. Lushington had already held in *Catterell v. Sweetman* (1845), 1 Rob. Ecc. 304, that the statute did not avoid all marriages failing to satisfy its requirements.

of England to be necessary, I should be going the length of depriving thousands of couples married in the colonies and the East Indies (where till of late years were no chaplains) of the right to resort to this court for such redress as it can give in cases of cruelty or adultery. Until I am controlled by a superior authority, . . . most unquestionably I shall hold in this and all other similar cases that, where there has been a fact of consent between two parties to become man and wife, such is a sufficient marriage to enable me to pronounce, when necessary, a decree of separation.'

If this second rule laid down in *R. v. Millis* is not imported into British territories on the ground that it is unsuited to the local conditions, *a fortiori* it is inapplicable to non-British countries such as China or Siam. Indeed, in *R. v. Millis* itself, Lord Campbell said:

'It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties.'

This view has now been followed and the matter settled beyond further doubt by *Wolfenden v. Wolfenden*.² In that 1946. case:

Fact: A Canadian, whose domicil of choice appears to have been English, went through a ceremony of marriage with a Canadian woman in the district of Ichang in the Chinese province of Hupeh. The ceremony was performed, not by an episcopally ordained priest, but by the local minister of the Church of Scotland Mission. The husband petitioned for annulment on the ground that there had been no valid marriage.

held in marriage as valid in common law.

Lord Merriman regarded *Catterall v. Catterall* as conclusive, and held that the marriage was formally valid at common law.

This decision was approved and followed in *Isaac Penhas v.*

Tan Soo Eng,³ where a marriage between a Jew and a Chinese woman had been celebrated at Singapore in a somewhat unusual fashion. At the ceremony the man worshipped according to Jewish custom, the woman observed the Chinese rites. Upon proof, however, that the parties had expressed their willingness to take each other as man and wife, the Privy Council held that they had contracted a valid marriage at common law.

1953. held by Privy Council.

¹ 10 Cl. & F. 584, at p. 786.

² [1946] P. 61. A similar case was *Phillips v. Phillips* (1921) 38 T.L.R. 150.

³ [1953] A.C. 304.

Application
of the com-
mon law to
marriage
abroad
recently
extended

The control of the common law over marriages abroad was extended by the Court of Appeal to a startling degree in *Taczanowska v. Taczanowski*,¹ where the facts were as follows:

Two Polish nationals were married in Italy in 1946 by a Polish Army chaplain according to the rites of the Roman Catholic Church. The husband was serving in the Polish 2nd Corps, an independent command in belligerent occupation of Italy under General Anders. The marriage ceremony did not comply with the local forms and was therefore void by Italian law, but it would be recognized as valid by the law if it was valid by the national law of the parties. It was, however, not valid by Polish law.

The parties came to England in 1947, in which year a child was born, and lived together until 1950. In 1955 the wife petitioned for a decree of nullity on the ground that the marriage was void for non-compliance with the local forms.

The argument of the husband that the marriage was valid by virtue of section 22 of the Foreign Marriage Act, 1892, failed, for the Polish Army chaplain was not officiating under the orders of a commanding officer of a British army serving abroad.² The Court of Appeal, however, animated perhaps by a desire to save many similar marriages,³ reversed Karminski J. and held the marriage to be valid, notwithstanding that compliance with the local forms had presented no great difficulty. The reasoning was that the rule requiring observance of the formalities of the *lex loci* rests upon the presumption that the parties have subjected themselves to the local law, and therefore if it can be shown that they did not in fact submit to that law the presumption is rebutted and the court may apply the common law of England. A member of a conquering army stationed in a conquered country cannot reasonably be assumed to have subjected himself to the local law.⁴

Criticism
of the
*Taczan-
owska Case*

It is submitted with respect that the decision is open to several objections. In particular, it is doubtful whether the view, that the principle *locus regit actum* is based upon the intention of the parties, derives support from the sole authority

¹ [1957] P. 301. See 20 *M.L.R.* 641 (L.J. Blom-Cooper); 7 *I. & C.L.Q.* 217-61 (D. Mendes de Costa); 33 *B.Y.B.I.L.* 333-4 (P. B. Carter).

² *Supra*, p. 336.

³ Said to number between three and four thousand.

⁴ [1957] P. 301, at pp. 325 (Hodson L.J.); 330 (Parker L.J.); 332 (Ormerod L.J.). It seems clear that, had it been possible, the court would have extended the doctrine of *renvoi* to this type of case, i.e. it would have held the marriage valid had it been valid by the Polish law to which the Italian *lex loci celebrationis* referred; see Dicey, p. 76.

cited in its favour. This was the passage from the judgment of Sir Edward Simpson in *Scrimshire v. Scrimshire*,¹ where he said:

'As both parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage, and as their mutual intention must be presumed to be that it should be a marriage or not according to the law of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of marriage or contract *ad aliud examen*, to be tried by different laws than those of the place where the parties contracted.'

These remarks were made over two hundred years ago when the prevalent belief appears to have been that only if the parties were subject to the jurisdiction of, say, the French courts would the formal validity of the marriage be governed by French law, and in the view of one learned writer all that Sir Edward Simpson was at pains to explain was that by marrying in France the parties must be presumed to have subjected themselves to the jurisdiction of the local courts.² Later decisions, however, have gradually distinguished jurisdiction from choice of law and have restated the authority of the *lex loci celebrationis* in more absolute terms.³ In any event, to say that the presumed intention of the parties is to subject the formal validity of their marriage to the law of the country where they marry is far from saying that they can exclude that law by showing a contrary intention. If such were the position, the principle *locus regit actum* would in this context be reduced to impotence.

Another effect of the *Taczanowska* decision is to allow almost illimitable scope to the rule that in certain circumstances the validity of a marriage abroad may be tested by reference to the common law. The previous authorities, as we have seen, appear to have subjected the application of the test to two conditions.

First, compliance with the local forms must have been insuperably difficult or repugnant to the conscience. The parties in the instant case were confronted with no such obstacle. Secondly, the parties must be British subjects.⁴ Nationality, indeed, is not normally an effective connecting factor in private international law and it would be more reasonable to make the

¹ (1752), 2 Hag. Con. 395, 411. *Supra*, p. 331.

² 7 I. & C.L.Q. 226-34 (Mendes de Costa).

³ See the passages cited *supra*, p. 331, including one from the judgment of Sir Edward Simpson in *Scrimshire v. Scrimshire*.

⁴ In *Martin v. Martin and May* (1928), 28 S.J. 612, referred to in 7 I. & C.L.Q. 247, note 41, the husband alone was a British subject.

held the marriage to be valid on the ground that the ceremony was one which created the status of husband and wife at common law.

There is little authority as to what constitutes a valid marriage solemnized in a merchant ship while on the high seas. Marriages on the high seas The general principle is that the law of the flag governs transactions on board a vessel, for, as Byles J. once said, a British ship is regarded as a floating island on which British law prevails.¹ This raises two difficulties in the case of British ships.

First, since there is no one system of law common to all the countries that employ the British flag, which particular legal system constitutes the law of the flag? The alternative seems to lie between English law and the municipal law of the country in which the ship is registered. The latter is the more reasonable rule and the one that is generally advocated.² There would be little justification, for instance, for applying English law to a transaction effected on board a ship registered in New South Wales, owned and administered by persons domiciled in that State, and plying only between ports in the Australian Commonwealth.

Presuming this view to be correct, the second difficulty is to discover from the authorities what part of English law governs a marriage upon a ship that is registered in England. Is it the common law or the common law as regulated by statute? The latter alternative appears clearly to be excluded. There is no statute that deals particularly with marriages at sea, except one which provides that every such marriage shall be entered in the ship's log,³ and the 'floating island' theory can scarcely be pressed so far as to suggest that the Marriage Acts are applicable. Except where modified by statute, the common law is in force on a ship, as in the analogous case of a colony. To make the analogy complete it must also be conceded that only so much of the law is imported into the ship as is suitable to the local conditions. That raises the further question whether it suffices that the parties have freely taken each other for man and wife, or whether, in accordance with *R. v. Millis*,⁴ it is necessary that the ceremony should have been performed by an ordained

¹ *R. v. Anderson* (1868), L.R. 1 C.C.R. 161, 168; but see *R. v. Carr* (1882), 10 Q.B.D. at p. 85; L.Q.R. 283; 19 *Juridical Review*, 178.

² Halsbury's *Laws of England*, vii. 101. This is the rule in New Jersey; see *Bolmer v. Edsall*, 90 N.J. Eq. 299, cited Dicey (5th ed.), p. 742. Compare the rule relating to torts committed on board a ship, *supra*, p. 296.

³ Merchant Shipping Act, 1894, s. 240 (6); 253 (1) (viii).

⁴ *Supra*, p. 341.

clergyman. That the presence of a clergyman is sufficient for validity seems generally to be admitted,¹ but that it is essential appears unwarranted. The impossibility of procuring a clergyman on the high seas is even more apparent than in the case of a remote part of China, and it is difficult to resist the conclusion that the rule laid down in *Wolfenden v. Wolfenden*² applies equally to a ship. The argument sometimes advanced, that a ship must sooner or later put into a port where advantage may be taken of the facilities offered by the local law or by the Foreign Marriage Act, is of little weight. It can be countered by the reflection that the same facilities are open to parties in a remote part of China if they are prepared to make the necessary journey.

It is sometimes suggested that the absence of a clergyman is fatal to the validity of a marriage at sea, unless it is a marriage of necessity.³ What this ambiguous expression means is not explained, but there is little doubt that it is taken from the Irish case of *De Moulin v. Druitt*⁴ in 1860, which is no longer a safe guide. In that case:

Irish case
1860.

fact:-

A woman stowaway was discovered on a troopship during a voyage to India. In the lofty fashion of those days the commanding officer ordered that she should immediately be married to one of the troops. A candidate was found, and the marriage was celebrated on the quarter-deck in the presence of the commanding officer.

1849. The court held that the rule in *R. v. Millis*⁵ applied and that the marriage was void. *Maclean v. Cristall*,⁶ a case where a marriage celebrated in India by a Congregationalist minister not in holy orders was held to be valid, was distinguished on the ground that the marriage was not one 'of necessity', since the vessel would touch at places where a clergyman would be obtainable. Having regard to *Wolfenden v. Wolfenden*,⁷ it would seem that this peculiar reasoning need no longer be considered seriously.

It is submitted, then, that if parties, whatever their domicile or nationality, voluntarily take each other as man and wife while at sea in a vessel registered at an English port, the marriage is formally valid in the eyes of English law.

¹ 5 L.Q.R. 53.

² *Supra*, p. 343.

³ Latey on Divorce, p. 30; Halsbury's *Laws of England* (2nd ed.), xvi. 597. (1860), 13 Ir. C.L. Reps. 212.

⁴ (1860), 13 Ir. C.L. Reps. 212.

⁵ (1843-4), 10 Cl. & F. 534; *supra*, p. 341.

⁶ (1849) Perry's *Oriental Cases*, 75.

⁷ [1946] P. 61; *supra*, p. 343.

It has never been doubted, of course, that a marriage in a foreign country, where local formalities are non-existent or where those that exist are inapplicable to an English marriage, is valid if it is contracted in the presence of an episcopally ordained priest or deacon.¹

IV. MATRIMONIAL CAUSES

Introduction. *Pages* 349-52.

A. Suits for Nullity of Marriage. *Pages* 352-83.

B. Suits for Dissolution of Marriage. *Pages* 383-408.

C. Suits for Judicial Separation. *Pages* 408-14.

D. Suits for Restitution of Conjugal Rights. *Page* 414.

Introduction

A matrimonial cause is now statutorily defined as an action for nullity of marriage, divorce, judicial separation, jactitation of marriage or restitution of conjugal rights.² In early days these actions, or suits as they are generally called, raised no question of private international law, since, with the exception of divorce *a vinculo*, i.e. dissolution of marriage, which was not then recognized, they were all exclusively subject to the jurisdiction of ecclesiastical courts whose sway extended throughout western Europe.

Before the Reformation matrimonial causes raised no conflict

'The jurisdiction of the Court Christian', said James L.J., 'was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz. the domicil affecting the secular rights, obligations and status of the parties.'³

The jurisdiction depended upon residence. Every person resident within a diocese was subject to the jurisdiction of the Bishop. Moreover, not only did the courts administer a law that was common throughout Christendom, but their judgments were recognized both by secular and ecclesiastical authorities. This state of affairs came to an end with the Reformation, which disrupted the unity that had previously characterized ecclesiastical law and the courts by which it was

¹ *Limerick v. Limerick* (1863), 32 L.J. (P.M. & A.) 92; *Phillips v. Phillips* (1921), 38 T.L.R. 150.

² Supreme Court of Judicature Act, 1925, s. 225.

³ *Niboyet v. Niboyet* (1878), 4 P.D. 1, 4.

administered. Every person resident in an English diocese was still subject to the ecclesiastical jurisdiction of the Bishop, but the law administered by him was essentially English law and his decrees were not entitled as of right to recognition in other Christian countries. By legislation passed in the reign of Henry VIII, the right of appeal which had formerly lain to the Pope now lay to the Crown.¹

The
canonist
doctrine of
indissolu-
bility

The most important matter upon which English law ultimately came to differ from that of the Continent was divorce. The canon law, purporting to be the law of God and to have derived its principles from the Scriptures, imposed the doctrine of the indissolubility of marriage upon the western Church. There was in theory no escape save by death. Divorce *a vinculo* was prohibited. Two remedies were, however, available—divorce *a mensa et thoro*, nowadays called judicial separation, and annulment. The former left the parties indissolubly married but separated them from bed and board. It was granted for adultery, unnatural offences, cruelty, heresy and apostasy. The second remedy of annulment was manipulated with such ingenuity that in practice it frequently served the same purpose as divorce *a vinculo*. According to canon law both consent and sexual intercourse (*coitus*) were the essential requirements of a valid marriage. Consent without *coitus* or *coitus* without consent was insufficient.² There were, therefore, two kinds of impediments to marriage, either of which was cause for annulment. First, any defect which vitiated the initial contract, such as want of free consent due to duress, mistake, fear and the like, or an earlier espousal to another person, or consanguinity. Such a defect was an *impedimentum dirimens*, a destructive impediment that notwithstanding *coitus* rendered the marriage void *ab initio*. Secondly, failure to follow consent by *coitus* constituted an *impedimentum impeditivum*, an obstructive impediment that was ground for annulment. The canonists showed such acumen in adapting these impediments to the needs of particular cases that in practice it was not uncommon for parties to regain by annulment their status of celibacy without disturbing the doctrine of indissolubility. This doctrine was never abandoned but its inconveniences were mitigated.³

¹ Westlake, p. 83.

² 'Coitus sine voluntate contrahendi matrimonium et defloratio virginitatis sine pactione conjugali non facit matrimonium', Gratian, *Decretum*, C. 34.

³ In the Marlborough Case in 1926 the Roman Rota affirmed a declaration of the Southwark Diocesan Court that a marriage celebrated in 1895 was void on the

The Reformation did not enlarge the power of the ecclesiastical courts in England to grant matrimonial relief. Annulment of marriage on the grounds recognized by canon law was possible, dissolution was still impossible. But growing dissatisfaction with the doctrine of indissolubility led to the practice of obtaining a divorce by a private Act of Parliament, the first case being that of the Marquis of Northampton in 1551.¹ This was an expensive and a complicated proceeding. The husband first obtained from the ecclesiastical court a decree of divorce *a mensa et thoro*, which, though it separated him from his wife, did not entitle him to remarry. He then sued at common law to recover damages from the man who had committed adultery with his wife. Finally he promoted in the House of Lords a private Bill for Divorce, which was in effect a bill to procure the right of remarriage.² This proceeding was legislative only in form. The House had its own law and practice in the matter, and it functioned as a Court of Justice with the apparatus of counsel and witnesses. This method of obtaining a divorce still prevails in Quebec, and in Northern Ireland it was not supplanted by judicial process until 1939. On the other hand, a divorce by judicial process has been possible in Scotland since the sixteenth century.

English
practice
after the
Reforma-
tion

A fundamental change was effected in England by the Matrimonial Causes Act, 1857, which transferred jurisdiction in matrimonial causes from the Church to the State. It set up a 'Court for Divorce and Matrimonial Causes', and conferred upon this civil tribunal jurisdiction to entertain suits for judicial separation, nullity of marriage, restitution of conjugal rights and jactitation of marriage, though as regards these matters there was express statutory provision that relief should be given on principles and rules that should be as nearly as possible conformable to the principles and rules on which the ecclesiastical courts had previously acted.³ In addition, the Act made a complete break with the past by empowering the court to pronounce a decree for dissolution of marriage.

Matrimonial
Causes
Act, 1857

It is now necessary to examine the various matrimonial causes separately and to ascertain, in each case, first, what ground that the wife had not given her free consent to the union. There were two children of the union, the parties had been divorced in 1920, and each had remarried.

¹ The so-called divorces of Henry VIII were in fact annulments.

² There seem to have been only four occasions upon which a wife promoted a private bill.

³ S. 22; repealed by the Judicature Act, 1925, and replaced by s. 32 of that Act.

suffices from the point of view of English private international law to give a court, whether English or foreign, jurisdiction to entertain the suit, and secondly, what system of law will govern the suit when such jurisdiction exists.

A SUITS FOR NULLITY OF MARRIAGE

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 - (ii) Annulment of void marriages. *Pages 378-81.*
 - (a) Jurisdiction based on domicil. *Pages 378-80.*
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I. Introduction

Unsatisfactory
state of the
law

In the field of private international law the English decisions with respect to nullity of marriage, as regards both jurisdiction and choice of law, are still in an unsatisfactory state. They suffer from several defects. They fail to appreciate that the rules which governed the old ecclesiastical courts are scarcely congenial to the changed conditions of the modern world; they more often than not disregard the distinction between jurisdiction and choice of law; they frequently fail to disclose which of two or more possible grounds is the *ratio decidendi*; and so far they have not elaborated a coherent system of law based

upon broad general principles. A further cause of confusion is that English law requires the remedy of annulment to cater for acts that analytically should be regarded as grounds for divorce. Meanwhile, piecemeal legislation has increased the inelegance of this department of law.

One cause of the present discontents is the distinction, which appears to be disappearing in other European countries,¹ that English international law makes between void and voidable marriages. A marriage is void *ab initio* in the following cases:

Distinction
between
void and
voidable
marriages

Void mar-
riages in
English
law

- (i) If either party is under sixteen years of age.²
- (ii) If the appropriate formalities have not been observed.³
- (iii) If the parties are within the prohibited degree of relationship as laid down in the first schedule to the Marriage Act, 1949, as amended by the Marriage (Enabling) Act, 1960.⁴
- (iv) If either party is already married.
- (v) If either party is coerced into marrying, or is fraudulently misled as to the identity of the other party or as to the nature of the ceremony.⁵

A marriage is voidable in the following cases:

Voidable
marriages
in English
law

- (i) If, owing to impotence, either party is incapable of consummating the marriage.
- (ii) If either party wilfully refuses to consummate the marriage.⁶
- (iii) If, at the time of the marriage, either party was then suffering from mental disorder within the meaning of the Mental Health Act, 1959, or was subject to recurrent attacks of insanity or epilepsy.⁷
- (iv) If the respondent was suffering at the time of the marriage from venereal disease in a communicable form.⁸
- (v) If the respondent at the time of the marriage was pregnant by some man other than the petitioner.⁹

¹ 64 *L.Q.R.* 533 et seqq. (E. J. Cohn); 20 *M.L.R.* 568-9 (J. K. Grodecki).

² Marriage Act, 1949, s. 2.

³ *Ibid.*, s. 2.

⁴ S. 1.

⁵ See, for example, *Mehia v. Mehia*, [1945] 2 All E.R. 690; *infra*, p. 372.

⁶ Matrimonial Causes Act, 1950, s. 8 (1) (a).

⁷ *Ibid.*, s. 8 (1) (b); as amended by the Mental Health Act, 1959, 7th Schedule.

⁸ *Ibid.*, s. 8 (1) (c).

⁹ *Ibid.*, s. 8 (1) (d). In cases (iii), (iv), and (v) no decree must be granted unless the court is satisfied that the petitioner at the time of the marriage was ignorant of the facts, that proceedings have been instituted within one year of the marriage, and that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

Effect of
void
marriage

The view taken by English law is that a void marriage is a complete nullity from the beginning. It is as if the parties were living together in sin without having gone through a ceremony of marriage. No proceedings are necessary to establish the fact of nullity.

'A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is the issue as never having taken place, and can be so treated by both parties to it without the necessity of any decree annulling it.'¹

Moreover, any member of the public may treat the marriage as void, notwithstanding the absence of a decree, as, for instance, by withholding payment of money that is due to the woman conditionally on her being the wife of the man.

Effect of
voidable
marriage

On the other hand, the effect of a defect, such as impotence, which renders a marriage voidable, is far different, for the status of the parties as husband and wife, having sprung from a contract free from imperfection, cannot be affected until the existence of the defect has been proved, and therefore the rule is that the marriage is valid and must be treated as such by every court and every person until it has been judicially declared void. No one but the parties themselves can be heard to deny that they are married or can challenge, by nullity proceedings or otherwise, the validity of their marriage. Until either of them obtains a decree of nullity, all the normal consequences of the married status ensue, both *inter se* and as regards third parties.²

Voidable
marriage:
retrospec-
tive effect
of annul-
ment

Nevertheless the annulment of a voidable marriage has a retrospective effect. The parties possess the status of husband and wife until annulment, but from that moment they are regarded as never having been married.³ The form of the nullity decree makes this clear:

'Let the marriage in fact had and solemnized be pronounced and declared to *have been* and to be absolutely null and void to all intents and purposes in the law whatsoever . . . and the petitioner be pronounced to *have been* and to be free from all bond of marriage with the respondent.'

This doctrine of relation back may lead to bizarre situations,⁴

¹ *De Reneville v. De Reneville*, [1948] P. 100, 111; per Lord Greene.

² *In re Eaves*, [1939] Ch. 1000, 1003; *Fowke v. Fowke*, [1938] Ch. 774, 779; *De Reneville v. De Reneville*, [1948] P. 100, 111; *R. v. Algar*, [1954] 1 Q.B. 279.

³ *Newbould v. A.G.*, [1931] P. 75. See F. H. Newark, 8 *M.L.R.* 203.

⁴ *Mason v. Mason*, [1944] N.Ir. 134; see 61 *L.Q.R.* 341 et seqq.

but its worst possibilities are avoided by the rule that transactions completed before annulment cannot be set aside.¹ Until recently it might operate to bastardize children who had perhaps for many years been the legitimate offspring of a valid marriage,² but it is now enacted that:

When a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.³

The doctrine of relation back is no doubt explicable on historical grounds. According to canon law a marriage is indissoluble. It cannot be temporarily valid. It must either exist for ever or it must never have existed. The only form of nullity decree, therefore, open to the ecclesiastical courts was one which declared that the parties had never been married. The form is still retained, but in these latter days the doctrine and the reasons upon which it was founded are scarcely compatible with contemporary views respecting the sanctity of the marriage tie. As Lord Goddard said, the form 'perpetuates a canonical fiction'.⁴

Historical basis of retrospective doctrine

One result of the distinction between void and voidable marriages, of vital significance in the present context, is its bearing upon the domicile of the woman. The rule that a wife takes the domicile of her husband by operation of law presupposes a marriage. It therefore does not apply to a void marriage, for if the parties have never been married there is no 'wife' and no 'husband'. Of course, if the woman in fact establishes her permanent home in the man's country, as will more often than not be the case, she will acquire a domicile of choice there. In other words she is free to acquire it, but it does not attach to her automatically.⁵

Void marriage as such does not change the woman's domicile

On the other hand, a voidable marriage confers the status of married persons upon the parties, and one of the consequences of this is that the woman, in her capacity as wife, necessarily and automatically acquires her husband's domicile. This remains true even if she presents a petition for nullity which, if

In voidable marriage wife automatically takes husband's domicile

¹ *Dodworth v. Dale*, [1936] 2 K.B. 503; *Fowke v. Fowke*, [1938] Ch. 774; *In re Eaves*, [1939] Ch. 1000. But see *In re Ames' settlement*, [1946] Ch. 217.

² *Dredge v. Dredge*, [1947] 1 All E.R. 29.

³ Matrimonial Causes Act, 1950, s. 9.

⁴ *R. v. Algar*, [1954] 1 Q.B. 279, 288.

⁵ *De Reneville v. De Reneville*, [1948] P. 100, 110.

successful, will lead to a declaration that she has never been married. The retrospective terms of the decree that may possibly be granted cannot disturb her former status of a wife.¹ 'To hold otherwise would be to allow oneself to be misled by the mere wording of a form of decree which was adopted in the past for reasons which are no longer appropriate.'²

What law
determines
whether a
marriage is
void or
voidable?

The grounds upon which an English court assumes jurisdiction to declare a marriage void are not the same as those upon which it assumes jurisdiction to annul a voidable marriage. The question may arise, therefore, at the jurisdictional stage, whether, presuming an assumption of jurisdiction, a decision in favour of the petitioner would amount to declaring the marriage void *ab initio* or to the annulment of a voidable marriage. Needless to say, all legal systems do not adopt the same criteria by which to distinguish grounds for declaring a marriage void from grounds for treating it as voidable. For example, in some countries impotence and wilful refusal render a marriage void; in others, like England, they make it voidable; in others again they justify divorce.³ At first sight it might seem that an English court ought to apply its own criteria for determining whether the problem *sub judice* is one of alleged voidness or of alleged voidability. A moment's reflection, however, reveals the illogicality of this suggestion. Whether a marriage is void or voidable is merely a facet of the question whether it is valid or invalid. The law which determines its validity or invalidity must also determine what is meant by invalidity, that is, whether it means voidness or voidability.

Depends
upon
nature of
alleged
defect

In order to identify the law determining validity or invalidity (and thus voidness or voidability), we must look to the juridical nature of the defect that is alleged to vitiate the marriage. As will be seen later, such defects are either contractual or personal. The former are those which vitiate either the contract to marry or the ceremony by which that contract is implemented, and which do not represent an incapacity personal to those very parties or to one of them. They are referred to the *lex loci celebrationis*. An obvious example is a failure to observe the correct formalities at the marriage ceremony. In contrast, the alleged infringement of a rule disabling the one party from marrying the other, as for instance a rule prohibiting the intermarriage of an uncle and his niece, asserts

¹ *De Reneville v. De Reneville* [1948], at p. 111, per Lord Greene.

² *Ibid.*

³ Wolff, *op. cit.*, p. 82, note 6.

the existence of a *personal defect* that must be referred to the law of the matrimonial domicile.¹

The role of the proper law, whether it is the *lex loci celebrationis* or the law of the matrimonial domicile, is to determine whether the alleged defect is sufficient ground for annulment and if so what consequences ensue, presuming its existence to be proved. One of these consequences is the extent of the invalidity of the union, i.e. whether the marriage is merely voidable or void *ab initio*.

In *De Reneville v. De Reneville*,² for instance,

a wife, resident in England, petitioned the court for the annulment of her marriage to a man domiciled and resident in France on the ground of his incapacity or wilful refusal to consummate the marriage.

Function
of the
proper law

Operation
of the
proper law
illustrated

The jurisdictional principles applicable to these facts were that if the marriage was void for either of these defects, the petitioner would be entitled to relief by virtue of her separate English domicile; but that if it was voidable, she would be domiciled in France and her mere residence in England would not render the court competent to entertain the suit. The Court of Appeal held that it fell to French law, as being the law of the matrimonial domicile, to determine the effect of impotence or wilful refusal, both of which are examples of personal defects. Since the French rule on the matter, however, had not been given in evidence, it was assumed to be the same as that obtaining in England with the result that the marriage was treated as voidable and the petition was dismissed.³

With these preliminary remarks, an attempt will now be made to state the existing law, dealing first with suits brought in England and then with the recognition of suits that have already been concluded abroad.

(2) English Suits

(I) Jurisdiction

(i) Annulment of voidable marriages.

(a) *Petition based on domicile.* In the case of a voidable marriage the domicile of the husband is necessarily communicated to the wife, and if this common domicile is English it is undoubted

Juris-
diction
exists if
husband
domiciled
in England

¹ *Infra*, pp. 371-6.

² [1948] P. 100.

³ This was unfortunate, for by French law neither impotence nor wilful refusal renders a marriage void or voidable, though in certain circumstances either may justify divorce as being an *injure grave*; Amos and Walton, *Introduction to French Law*, p. 61; 20 *M.L.R.* p. 575 (J. K. Groddeck).

that the court possesses nullity jurisdiction. As Lord Phillimore said in a leading case:

‘For the purpose of pronouncing upon the status of the parties as well as for the purpose of affecting that status, the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively.’¹

The authorities which establish this proposition all relate to the jurisdiction of the foreign court of the common domicile, but obviously they are equally applicable to a case where the parties are domiciled in England.²

Juris-
diction
when
husband,
not domi-
ciled in
England,
deserts wife

There is one exceptional case, based upon the prior English domicile of the wife alone, in which the Matrimonial Causes Act, 1950, section 18 (1) (a) confers jurisdiction upon the court, notwithstanding that at the time of the proceedings the common domicile of the parties is foreign.

The Act provides that the court shall have jurisdiction to entertain proceedings by a wife

if she has been deserted by her husband or if the husband has been deported as an alien from the United Kingdom, provided that he was domiciled in England *immediately before the desertion or deportation*.³

The words italicized stress the restrictive nature of this enactment. Its operation is conditioned by the prior English domicile of the husband and therefore of the wife, and the critical date for this purpose is the time of the desertion or deportation. Despite desertion or deportation, it does not avail a woman merely because she was domiciled in England immediately before her *marriage* to a man domiciled abroad. Her only remedy in such a case, in addition to instituting proceedings in the husband's domicile, is to take advantage of section 18 (1) (b) of the same statute which bases jurisdiction upon her residence in England.⁴

¹ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 670.

² *Ibid.*; *Inverclyde v. Inverclyde*, [1931] P. 29; *De Reneville v. De Reneville*, [1948] P. 100.

³ Matrimonial Causes Act, 1950, s. 18 (1) (a) re-enacting the Matrimonial Causes Act, 1937, s. 13. ‘Proceedings’ includes divorce, judicial separation and restitution of conjugal rights as well as annulment. The Matrimonial Causes (War Marriages) Act, 1944, was another example of jurisdiction based upon the prior domicile of the wife, but proceedings under this Act ceased to be possible after 1 June 1955; *S.I.*, No. 672 of 1950.

⁴ Matrimonial Causes Act, 1950, s. 18 (1) (b); *infra*, pp. 362; 388.

(b) *Petition based on English residence.* The fundamental question, which for several years was a matter of controversy, is whether mere residence in England, even of both parties, is sufficient to found the jurisdiction of the court in the case of a voidable, as distinct from a void, marriage. In *Inverclyde v. Inverclyde*,¹ Bateson J. took the view that since the decree of nullity, despite its retrospective effect, terminates the status which the parties have hitherto possessed, it should for purposes of jurisdiction be equated with a decree of divorce, with the result that the only competent court will be the court of the common domicil. The facts of the case were as follows:

Is Annulment of voidable marriage to be equated with divorce?

Facts: The wife petitioned the English court for annulment on the ground of the impotence of her husband. The marriage had been celebrated in London, the domicil of the parties was Scottish, the petitioner resided in England, the respondent had residences both in England and Scotland.

1931 case -

Bateson J. dismissed the petition on the ground that since the parties were not domiciled in England he lacked jurisdiction. His reasoning in brief was this:

The principle that the court of the domicil has exclusive jurisdiction in divorce was not established until 1895,² long after the abolition of the ecclesiastical courts; the basis of this principle is that a divorce suit affects status; a nullity suit in respect of a voidable marriage equally affects status; therefore the annulment of a voidable marriage should be equated with divorce and should depend exclusively upon the domicil of the parties, at any rate if the cause for annulment is impotence.³

'Nullity on the ground of impotence', he said, 'is a suit to avoid a marriage and is in essence a suit to dissolve it. . . . The marriage remains a marriage until one of the parties seeks to get rid of the tie. In other cases, such as bigamy, there has never been a marriage at all.'⁴

Regarded as a matter of principle, there is much force in the reasoning of the learned judge, if only on the ground that a decree of nullity in respect of a voidable marriage is a judgment *in rem*, i.e. one which finally adjudicates upon the status of a *res*. Marriage, though not literally a *res*, 'savours of a *res* and has all along been treated as such'.⁵ It is a disembodied thing. The principle of English law is that an effective adjudication *in rem*

The equation supported by nature of nullity decree

¹ [1931] P. 29.

² *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *infra*, p. 384.

³ The argument was summarized thus by the A.-G. for Northern Ireland in *Mason v. Mason*, [1944] N.Ir. 134.

⁴ [1931] P., at p. 40.

⁵ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 662, *per* Lord Dunedin.

can be given only by the court of the country wherein the *res* is situated. So the problem is—Where is this disembodied thing, the marriage, situated? If we are to be consistent, it can scarcely be situated in more than one place at one and the same time, which is tantamount to saying that the courts of the domicil and of the residence and of the place of marriage, if these places are different, cannot all be entitled to annul a voidable marriage. For the purposes of divorce, there is no doubt that the marriage is regarded by the common law as situated in the country of the domicil and nowhere else. Why, then, should not the same conclusion be reached in the case of the voidable marriage? Historically and technically, no doubt, divorce and annulment are not identical, but there is no theoretical or solid objection to ruling on rational grounds that the annulment of a voidable marriage must be regarded as a proceeding *in rem* triable only in the court of the domicil, since it declares to be non-existent a status which hitherto the parties have possessed in the eyes of the law and which, but for the annulment, they would lawfully have possessed until one of them died.

Practical
reasons
against the
equation

If, however, the matter is viewed in the light of convenience and natural justice, it is apparent that to confine jurisdiction to the court of the domicil, sound though it may be in principle, encounters a practical and serious objection. It places a needless restriction upon the right of a party to claim matrimonial relief. If followed literally, it means *inter alia* that the parties cannot obtain relief in a country where they have both been resident, though not technically domiciled, for a long time. This is an unnecessary hardship. The wise policy, it is submitted, is to multiply within reason the bases of jurisdiction, but to insist upon the application of the proper law. Strict principle may perhaps demand that the annulment of a voidable marriage, since it affects status, should be submitted to the court and to the law of the domicil. But convenience and justice demand with equal potency that proceedings for the enforcement of the *law* of the domicil should be available to the parties in the country where they are resident though not perhaps domiciled. It matters little where the machinery is put in motion, provided that the correct law is applied. The proviso, however, is of vital importance. What must be resisted at all costs is the present tendency to apply the *lex fori* as a matter of course. For an English court to annul a voidable marriage on a ground not recognized as sufficient by the foreign law of the

domicil is not only the negation of principle but socially scandalous. The mere widening of jurisdiction, however, need lead to no scandal.

There is no need, however, to pursue the matter further. The view of Bateson J. was rejected by two courts of first instance¹ and finally his decision was overruled by the Court of Appeal in *Ramsay-Fairfax v. Ramsay-Fairfax*,² where it was held that the jurisdiction of the court is well founded if *both* parties are resident in England, though domiciled in Scotland, at the time when the petition is presented. The equation rejected

It is perhaps a little unfortunate that the Lords Justices adopted the argument of counsel and justified the assumption of jurisdiction upon the practice of the old ecclesiastical courts rather than upon the score of convenience. It is true, of course, that the jurisdiction of those courts was conditioned by the residence of the parties in the diocese. It is also true that the present civil court was directed by the Act of 1857 to act and to give relief upon principles and rules as nearly as possible conformable to those that had obtained in the church courts.³ This contention, however, disregards the fact that, owing to the uniformity of matrimonial law and practice throughout Christendom, the early church courts were not troubled with questions of the conflict of laws, and it does not follow that a practice which was appropriate enough in those conditions should be continued in a different environment. As Wolff remarked, the ecclesiastical rule as to residence dealt with questions 'not of international jurisdiction but of local competence'.⁴ It was a rule that prescribed the jurisdictional area of the courts whose function it was to administer the uniform ecclesiastical law to members 'of the one catholic and apostolic church'. As such, it is scarcely a sure guide in days when the unity is a memory of the past, and if residence is to form a basis of jurisdiction it is in reason rather than in the ancient organization of domestic courts that it must find its vindication. Reasons for its rejection

¹ *Easterbrook v. Easterbrook*, [1944] P. 10; *Hutter v. Hutter*, [1944] P. 95.

² [1956] P. 115.

³ Matrimonial Causes Act, 1857, s. 22. This has been replaced by the more tepid enactment: 'The jurisdiction vested in the High Court and Court of Appeal respectively shall, so far as regards procedure and practice . . . be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained', Supreme Court of Judicature Act, 1925, s. 32.

⁴ *Private International Law*, p. 84. See also *Niboyet v. Niboyet* (1878), 4 P.D. 1, at p. 19, per Brett L.J.

Residence
of peti-
tioner alone
not a basis
of jurisdic-
tion

It is now settled by the decision of the Court of Appeal in *De Reneville v. De Reneville*¹ that at common law the residence in England of the *petitioner alone* does not give the court jurisdiction in respect of a voidable marriage. In the words of Lord Greene: 'That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience.'²

Statutory
jurisdiction
based on
residence
of wife

There is, however, one statutory exception to the rule that the English residence of the petitioner alone is insufficient to found jurisdiction. The Matrimonial Causes Act, 1950, section 18 (1) (b), re-enacting an earlier statute,³ provides that the court shall have jurisdiction at the instance of a wife

in the case of proceedings for divorce or nullity, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.⁴

The chief feature of this enactment is that it avails only the wife.⁵

Respond-
ent alone
resident in
England

In view of the present tendency to give a literal meaning to the statutory admonition that relief shall be given on principles and rules as nearly as possible conformable to those previously followed by the ecclesiastical courts,⁶ it is probable that jurisdiction would be assumed if the respondent alone were resident in England. This is a situation that will not often arise, for only rarely would a petitioner institute proceedings while absent from the country.

Is English
place of
marriage
a basis of
jurisdic-
tion?

(c) *Petition based on English place of ceremony*. The bare fact that the parties married in England has long been recognized as sufficient to confer nullity jurisdiction on the English court in respect of a void marriage,⁷ but the question is whether this

¹ [1948] P. 100; *supra*, p. 357, overruling *Robert v. Robert*, [1947] P. 164, and *Roberts v. Brennan*, [1902] P. 143, if the latter in fact decided that residence of the petitioner alone is a sufficient basis of jurisdiction. It was, however, concerned with a void marriage; see *infra*, p. 369.

² [1948] P., at p. 118.

³ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (1) (2).

⁴ Matrimonial Causes Act, 1950, s. 18 (1) (b).

⁵ For a fuller account of the sub-section, see *infra*, pp. 388-90.

⁶ Matrimonial Causes Act, 1857, s. 22, as amended by the Judicature Act, 1925, s. 32; *supra*, p. 351.

⁷ *Infra*, p. 369.

is a sufficient jurisdictional ground in the case of a marriage alleged to be voidable.

To consider the matter apart from precedent, it is submitted that both on principle and on the balance of hardship to the parties it is far from sufficient. Jurisdiction to alter the status of the parties against the whole world is not justifiable unless there is some substantial and reasonably enduring *nexus* between them and the forum. The general proposition of Bateson J. in *Inverclyde v. Inverclyde*¹ that the annulment of a voidable marriage affects the status of the parties is indisputable. No doubt, his refusal to assume jurisdiction on the ground of residence as distinct from domicile, though logical, was on practical grounds of convenience unfortunate, but that the court of the country where the parties chanced to marry, perhaps many years ago, should for that reason alone affect to alter their status, seems to be an unwarrantable departure from the general principles of jurisdiction.

The ques-
tion con-
sidered on
principle

To turn to more practical considerations, it is no doubt sometimes desirable to extend matrimonial jurisdiction on the score of convenience or of hardship to the petitioner, but there is little merit in requiring a respondent, resident and domiciled perhaps in some far distant country, to meet an attack upon his status in England merely because that was the country where he married.²

The present state of the relevant authorities is far from satisfactory. In *Casey v. Casey*,³ where the petitioner alleged the wilful refusal of her husband, domiciled and resident in one of the provinces of Canada, the Court of Appeal unanimously held that the English place of celebration does not *per se* render the court competent to annul a voidable marriage.

Present
state of the
authorities
Casey v.
Casey

'The mere fact that the ceremony of marriage took place in a country does not seem to me a ground for founding jurisdiction in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as effecting the ceremony.'⁴

In *Hill v. Hill*,⁵ the issue was not the wilful refusal, but the incapacity, of the respondent to consummate the marriage.

At the date of the proceedings, the husband was domiciled in Scotland, the wife was resident in England, but the marriage had been

¹ [1931] P. 29; *supra*, p. 359.

² *Casey v. Casey*, [1949] P. 420, at p. 433, *per* Somervell L.J.

³ [1949] P. 420.

⁴ *Ibid.*, at p. 433, *per* Somervell L.J.

⁵ [1960] P. 130.

1949.

solemnized in Middlesex some nine years previously. Collingwood J., taking the view that impotence is fundamentally different from wilful refusal, held that he possessed jurisdiction by virtue of the English place of marriage.¹

Whether incurable incapacity and wilful refusal to consummate a marriage are fundamentally contradictory in nature is a matter upon which judicial views have differed,² but at any rate they both make the marriage voidable, and it seems a little unfortunate that the jurisdictional rules should vary according to whether incapacity is due to impotence or to wilful refusal. What impressed the learned judge was that the distinction between voidness and voidability was of no significance to the ecclesiastical courts so far as jurisdiction was concerned, but it is respectfully submitted that the distinction could have had no jurisdictional relevance before the Act of 1857. In those days the sole prerequisite of jurisdiction was that the respondent should be resident in the diocese where the particular court spiritual functioned, and if this condition was satisfied the court was competent to pronounce upon the validity of all marriages, whether contracted in England or not and even though the parties were unconnected with England either by domicile or nationality.³

Ross-Smith v. Ross-Smith In *Ross-Smith v. Ross-Smith*,⁴ where the same question was again litigated, Karminski J., differing from Collingwood J., found himself unable to distinguish the decision of the Court of Appeal in *Casey v. Casey* and held that nullity jurisdiction in respect of a voidable marriage could not derive its origin from the place of marriage alone. The Court of Appeal, however, taking the view that the *ratio decidendi* in *Casey v. Casey* conflicts with *Ramsay-Fairfax v. Ramsay-Fairfax*,⁵ has now reversed the decision of Karminski J.⁶

The court rightly rejected the suggestion made in *Hill v. Hill* that for jurisdictional purposes incapacity is distinct from

¹ Lord Macdermott reached a similar conclusion in the Northern Irish case of *Addison v. Addison*, [1955] N.I. 1; Morris, *Cases on Private International Law*, p. 165.

² See, for example, *De Reneville v. De Reneville*, [1948] P. 100, 120 per Bucknill L.J.; *Casey v. Casey*, [1949] P. 420, 431 per Bucknill L.J.; *Harthan v. Harthan*, [1948] 2 All E.R. 639, 640 per Lord Merriman. (This part of his judgment is omitted from the Law Reports, [1949] P. 115.)

³ *Hutier v. Hutier*, [1948] P. 95, 99-100.

⁴ [1960] 3 W.L.R. 753; [1960] 3 All E.R. 70.

⁵ *Supra*, p. 361.

⁶ [1961] 1 All E.R. [1961] 2 W.L.R. 71.

wilful refusal, pointing out that these two grounds are frequently pleaded in the alternative, since more often than not it is impossible to account for the non-consummation of the marriage until all the evidence has been heard. 'It would, we think, be the height of absurdity if the court has to hear the whole of a case before it can decide whether or not it had jurisdiction to entertain it.'¹

On the other hand, the Lords Justices considered it to be a matter of 'vital significance' that 'the ecclesiastical courts drew no distinction, from the point of view of jurisdiction, between marriages void *ab initio* and those which were merely voidable'.² In support of this they cited a number of cases, decided by the civil courts since 1857, in which jurisdiction was assumed on the sole ground that England was the place of marriage,³ but it is respectfully submitted that these were all concerned with defects that, if proved, vitiated the marriage ceremony itself. They were cases of civil, not physical, incapacity. Their Lordships were troubled by the suggestion that this dichotomy of defects affects the question of jurisdiction. 'If it is to be held that jurisdiction exists where juristic capacity is in question, it may be asked, is it to be excluded where the issue relates to physical incapacity?' In other words, where is the line to be drawn? It may be suggested in reply that the place of celebration is *per se* a sufficient basis of jurisdiction if it is alleged that some infirmity in the contract to marry or in the marriage ceremony has prevented the parties from ever acquiring the status of husband and wife; but that it is not a sufficient basis if it is alleged that an admittedly existing status should be terminated.

The view of the Court of Appeal, that the main distinction between void and voidable marriages has been 'cut away' since *Ramsay-Fairfax v. Ramsay-Fairfax* overruled *Inverclyde v. Inverclyde*, seems a somewhat bold interpretation of a decision which merely held, contrary to the *Inverclyde* decision, that jurisdiction was well founded on the common residence of the parties in England.

The final word on this controversy, however, has yet to be written, for the respondent has appealed to the House of Lords. Reduced to its lowest terms, the question may be simply stated. Is it just and socially desirable that a respondent,

¹ [1961] 2 W.L.R. at p. 81.

² Ibid. at p. 76.

³ *Simonin v. Mallac* (1860), 2 S.W. & Tr. 67; *Sottomayor v. De Barros* (1877), 3 P.D. 1; *Cooper v. Crane*, [1891] P. 369; *Linke v. Van Aerde* (1894), 10 T.L.R. 426; *Hussein v. Hussein*, [1938] P. 159.

domiciled and resident abroad and who has possibly never been domiciled or resident in England, should be compelled to resist an attack in England on his existing status merely because he was married in England? That the answer should be in the negative is fortified by the remembrance that the English judges, having once assumed jurisdiction, have invariably determined the issue according to English internal law.¹

(ii) *Annulment of void marriages.*

(a) *Pétition based on domicil.* There is ample authority for the somewhat obvious rule that the court of the country in which both parties are domiciled has nullity jurisdiction in respect of a void marriage.² In this type of marriage, however, the woman does not acquire her husband's domicil by operation of law.³ If, therefore, she was domiciled abroad before going through a ceremony of marriage with a man domiciled in England and the jurisdiction of the court is invoked by reason of a common domicil, it must be proved that she has in fact acquired an English domicil of choice.

(β) *Petitioner alone domiciled in England.* It is also established that the English domicil of the petitioner alone, whether the man or the woman, suffices to found jurisdiction. If this were not so and if a common domicil were required in all cases, the question of jurisdiction might be insoluble, for since no marriage exists there cannot be a common domicil unless the woman acquires a domicil of choice in England.⁴

Petition by the woman. In *White v. White*⁵ the domicil of the woman alone was held to be a valid basis of jurisdiction. The facts were these:

Facts: A domiciled Englishwoman, while on a trip to Australia, went through a ceremony of marriage at Melbourne with the respondent, whose wife was still living. The woman returned to England two days later without any consummation of the marriage. She later took nullity proceedings in England. The respondent did not enter appearance, but he acknowledged service of notice to appear and signed a formal admission that at the time of the Melbourne ceremony he was married to a wife resident in Malta.

Bucknill J. granted a decree notwithstanding that the re-

¹ *Infra*, pp. 370-1.

² *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641; *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Galene v. Galene*, [1939] P. 237.

³ *Supra*, p. 355.

⁴ *De Reneville v. De Reneville*, [1948] P. 100, 113, *per* Lord Greene.

⁵ [1937] P. 111.

spondent was neither resident nor domiciled in England. For a time it was controversial whether the learned judge had assumed jurisdiction on the ground of the domicile or of the residence of the petitioner in England. The Court of Appeal has now, however, approved the decision and has placed it squarely on the ground of domicile.¹ There are other cases in which jurisdiction has presumably been based upon the pre-ceremony domicile of the woman.²

Jurisdiction will likewise exist by virtue of domicile if it is the man who is alone domiciled in England.³ This will occur, for instance, where he goes through a ceremony with a woman domiciled abroad who does not acquire her own domicile of choice in England. Petition by the man

An exceptional case, in which a woman is entitled to invoke the jurisdiction of the court by reason of her prior English domicile, arises under section 18 (1) (a) of the Matrimonial Causes Act, 1950,⁴ which has already been discussed.⁵ (γ) Exceptional statutory case

(b) *Petition based on English residence.* As we have already seen, section 18 (1) (b) of the same Act empowers the English court to annul a void marriage if the woman is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of proceedings by her, provided, however, that the man is not domiciled in another part of the United Kingdom or in the Channel Islands or the Isle of Man.⁶ Jurisdiction based on ordinary residence of wife

Two questions remain.

First, is nullity jurisdiction in respect of a void marriage well founded at common law on the residence of both parties in England?

Secondly, does the common law rule, that the English residence of the petitioner alone is an insufficient basis of jurisdiction in the case of a voidable marriage,⁷ apply to a void marriage? Is common residence or residence of petitioner sufficient?

It is submitted that either common residence or the residence of the petitioner alone should suffice in the case of a void

¹ *De Reneville v. De Reneville*, [1948] P. 100, 112-13.

² e.g. *Hussein v. Hussein*, [1938] P. 159.

³ *Wolfenden v. Wolfenden*, [1946] P. 61 (where the petitioner seems to have acquired an English domicile); *Way v. Way*, [1950] P. 71; reversed *sub nom. Kenward v. Kenward*, [1951] P. 124.

⁴ S. 18 (1) (a).

⁵ *Supra*, p. 358; see also *infra*, p. 388.

⁶ Matrimonial Causes Act, 1950, s. 18 (1) (b); *supra*, p. 362.

⁷ *Supra*, p. 362.

marriage. Two practical considerations in favour of the submission are that the legislation recognizes the sufficiency of a limited period of residence by the wife, when proceedings are instituted by her, and also that, at any rate according to one authority, a foreign annulment, even of a voidable marriage, based upon the residence of both parties in the forum, must be recognized as effective by English law.¹

Submitted
that resi-
dence of
petitioner
alone
suffices

The real mystery, indeed, is why any doubt should exist. There is something to be said for the doctrinaire who insists that questions of status should be justiciable only in the court of the domicil and that therefore jurisdiction over a voidable marriage cannot be based upon residence, but the parties to a void marriage have never possessed the married status. Even a nullity decree, though it is declaratory of status, does not change status. It does not in truth nullify a marriage, but formally declares that a marriage never came into existence. Any member of the public can regulate his conduct on that undoubted fact, decree or no decree. Any court in England can pronounce upon the nullity of the ceremony regardless of the residence or domicil of the parties if the question arises *incidenter* in some other proceeding.² Is something more, then, than the English residence of the petitioner to be required if he desires a direct and authoritative ruling upon his status?

If a man domiciled in New Zealand, but resident for the last ten years in England, has gone through a ceremony of marriage in Paris with a Frenchwoman who is already married to a living husband, is he to be precluded from obtaining a nullity decree from the English court?

It is true that no decree is necessary, but it is at least socially desirable that the invalidity of his marriage, the ventilation of which in private conversation may cause him harm and suffering, should be judicially affirmed beyond all doubt. If the woman were to be indicted for bigamy, the court would be bound to pronounce upon the invalidity of the marriage, and it is a little inconsistent to deny it this power when the invalidity is the sole issue. The denial is even more harmful in cases other than bigamy, when the existence of the marriage admits of

¹ *Mitford v. Mitford*, [1923] P. 130; *infra*, p. 382.

² Dicey, p. 354; 61 *L.Q.R.* 343 (Morris). It is respectfully submitted that the following statement in Dicey is correct: 'The logical consequence of the above argument [i.e. that the court may pronounce upon the invalidity of a marriage if the question arises incidentally to other proceedings] is that there should be no rules as to jurisdiction in the case of a void marriage, and it is submitted that this is sound in principle'; Dicey, p. 355.

greater doubt. If, for instance, before the statutory extension of jurisdiction noticed above, the woman petitioner in *Mehta v. Mehta*,¹ whose marriage at Bombay was the result of deception, had been domiciled in New Zealand but long resident in England, it is scarcely conceivable that the judge would have refused jurisdiction to relieve her from an intolerable situation. It is doubtful even whether the much maligned decision of Jeune P. in *Roberts v. Brennan*² was incorrect. In that case: 1945-1952

A woman, whose domicil was probably English,³ went through a ceremony of marriage in the Isle of Man with a man domiciled in Ireland. The man was admittedly married to a wife still alive. The woman petitioned the English court for a decree of nullity on the ground of bigamy. At the time of the petition the man was resident in Ireland, but the reports of the case divulge nothing certain about the residence of the petitioner, except that in the original citation she had given an English address.

Jeune P. granted a decree, remarking that 'residence—not domicil—is the test of jurisdiction in a nullity case'. He was clearly wrong in excluding domicil as a basis of jurisdiction.⁴ He was also wrong if his statement implied that the residence of the petitioner alone is sufficient in the case of a voidable marriage. Nevertheless, it is scarcely rational or helpful to maintain that he lacked jurisdiction to record the non-existence of a marriage that by the admission of the respondent himself had in fact never been contracted. However, the doubt still exists and it cannot be denied that according to Lord Greene⁵ the residence of a petitioning wife is insufficient at common law to found jurisdiction, unless, indeed, he intended to limit his observation to the case of a voidable marriage.⁶

(c) *Petition based on English place of ceremony.* It is well established by a series of decisions dating back to 1860 that where a marriage is alleged to be void on the ground that it was never validly contracted nullity jurisdiction resides in the court of

¹ [1945] 2 All E.R. 690; *infra*, p. 372.

² [1902] P. 143; 18 T.L.R. 467; 71 L.J. (P.) 74. The various reports conflict to a considerable extent; see the remarks of Lord Greene in *De Reneville v. De Reneville* [1948] P. 100, at pp. 116–17.

³ She was born in Wales.

⁴ *Graham v. Graham*, [1923] P. 31, 37, *per* Horridge J.

⁵ *De Reneville v. De Reneville*, [1948] P. 100, 116.

⁶ *Ibid.*, at p. 117. The Royal Commission on Marriages and Divorce has recommended that the English court shall have jurisdiction in respect of a void marriage 'if the petitioner is in England at the commencement of the proceedings'; Cmd. 9678, pp. 233, 394.

the country where the ceremony took place, notwithstanding that the respondent is resident and domiciled abroad.¹ This rule is reasonable, for the question is not whether an admittedly existent status should be affected, as in the case of a voidable marriage, but whether the contract that purported to create the married status was valid, a matter which the court of the *locus celebrationis* is eminently competent to determine.²

In *Simonin v. Mallac*:³

A Frenchwoman domiciled in France had been married in London to a Frenchman, also domiciled in France. She petitioned for nullity on the ground that the marriage had been celebrated without the parental consent and the formal publication required by French law.

In the words of the Judge Ordinary, Sir Cresswell Cresswell, the court possessed jurisdiction on the simple ground that 'the parties by professing to enter into a contract in England, mutually gave to each other the right to have the force and effect of that contract determined by an English tribunal'.

(2) *Choice of law.*

Distinction
between
choice of
law and
jurisdiction
generally
neglected

One of the long-standing blemishes of this branch of private international law has been the almost complete disregard of the elementary and primary distinction between jurisdiction and choice of law. The tendency of the judges, after surmounting the problem of jurisdiction, has been to apply the internal law of England as a matter of course. Not only does this mean that the principles upon which the choice of law depends are undeveloped, but it is particularly regrettable that the personal law should be deprived of its control over the married status. In *Easterbrook v. Easterbrook*,⁴ for instance, the judge assumed

¹ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1 (consanguinity); *Cooper v. Cran*, [1891] P. 369 (coercion affecting consent); *Linke v. Van Aerde* (1894), 10 T.L.R. 426 (bigamy); *Ogden v. Ogden*, [1908] P. 46 (claimed to be void for want of parental consent); *Valier v. Valier* (1925), 133 L.T. 830 (mistake as to nature of ceremony); *Hussein v. Hussein*, [1938] P. 159 (duress); *Srini Vasan v. Srini Vasan*, [1946] P. 67 (bigamy).
² *Supra*.

³ This does not mean, of course, that the court of the domicile or of the residence of the parties is less competent; see the criticism of the rule by J. Unger in 43 *Transactions of the Grotius Society*, pp. 89-90.

⁴ [1944] P. 10. Similarly, *Hutter v. Hutter*, [1944] P. 95. See also *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115, *supra*, p. 361, where the court at the instance of the wife annulled a voidable marriage between parties resident in England, but domiciled in Scotland, although the husband had started like proceedings in Scotland. Presumably, the wife desired an English decree because she was entitled to maintenance in England but not in Scotland. In the court

jurisdiction apparently on the ground that the parties, though domiciled in one of the provinces of Canada, were resident in England, and then proceeded to annul their voidable marriage on a ground that was sufficient by English law but insufficient in any of the Canadian provinces. The justification probably was that he had no option, since evidence of Canadian law was not given. But the practice of presuming English and foreign law to be similar unless evidence to the contrary is offered threatens the principle that questions of status are subject to the law of the domicile, for by remaining silent the parties may be able to obtain annulment on easier terms than are allowed by that law. Knowledge of foreign law certainly cannot be imputed to the judge, but there is no reason why notice of the expediency of calling for evidence of it should not be imputed to him.¹

The ascertainment of the proper law in a nullity suit depends upon analysing the various defects that may constitute cause for annulment, in order to determine their intrinsic nature. Once this is done, the legal system to which a particular defect is subject will become reasonably apparent. The analysis must turn in the first place upon the distinction between the contract to marry and the status that emerges from the contract when it is implemented. It is a trite saying that marriage is an institution, not a contract, but the aphorism must not be allowed to obscure the equally obvious truth that the institution originates in a contract properly so called. The distinction requires emphasis in the present connexion, for in the English view the contract is governed in general by the *lex loci celebrationis*, while the ensuing status is a matter for the personal law. Thus the primary task is to separate the contractual defects from those, such as wilful refusal to consummate the marriage, that affect the status.

But the analysis must be carried further, for, if the *lex loci celebrationis* as such is to govern the contract, it is obvious that, since the parties may have no permanent or substantial connexion with the place of marriage, alleged defects which raise the question of their capacity for intermarriage, though certainly

below, [1956] P. 115, at p. 125, Willmer J. dealt specifically with the present contention, but in the circumstances he found the question of choice of law to be of no consequence since he had been satisfied by an affidavit of a Scots lawyer that 'in relation to such proceedings as these, Scots law—i.e. the law of the domicile—is the same as English law'.

¹ See the remarks of Falconbridge, 26 *Canadian Bar Review*, 915.

of a contractual nature, can scarcely be referred as a matter of course to the *lex loci*. Defects affecting the validity of the contract and the ensuing ceremony in which the identity of the actual parties is a matter of indifference, must be distinguished from those that affect the parties personally.

The former, such as want of form and probably also want of consent, are subject to the *lex loci celebrationis* and for the present purpose may conveniently be denominated 'contractual'. On the other hand, defects which consist in something peculiar to those very parties or to one of them, such as nonage, are subject to the personal law and may themselves be termed 'personal'.

Lack of correct formalities is a contractual defect What defects are to be classified as contractual is not entirely free from doubt. It is clear, of course, that a failure to observe the prescribed formalities at the marriage ceremony is comprised in this class.¹ In the words of Cotton L.J.:

'The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile.'²

Is absence of consent a contractual or personal defect? The doubtful question is whether contractual defects are restricted to those affecting the mere form of the ceremony. It is submitted, however, that anything which negatives the free consent that is a fundamental requirement of general contract law must also be classed as contractual. According to this, the question whether annulment is to be decreed on the ground that the petitioner was the victim of fraud, coercion or fear,³ or was mistaken with regard either to the identity of the respondent or the nature of the marriage ceremony, falls to be determined by the *lex loci celebrationis*. Thus in *Mehta v. Mehta*:⁴

1945. Facts. The petitioner, a woman domiciled in England, went through a ceremony of marriage in Bombay with the respondent, who was domiciled in India. The petitioner believed that the only purpose of the ceremony, which was carried out in a language unknown to her, was to convert her to the Hindu faith. Afterwards she learned that her conversion and marriage were effected at the same time.

¹ *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

² *Sottomayor v. De Barros* (No. 1) (1877), 3 P.D. 1, 7.

³ *H. v. H.*, [1954] P. 258. It is controversial whether duress renders a marriage void or voidable. The latest judicial view prefers the latter alternative, *Parojic v. Parojic*, [1958] 1 W.L.R. 1280, 1283, per Davies J.

⁴ [1945] 2 All E.R. 690.

Barnard J. held that she did not intend to marry the respondent, that a fraud had been perpetrated upon her and that therefore she must be granted a decree of nullity. Unfortunately it cannot be predicated that the learned judge treated the defect as contractual, for he did not inquire whether the mistake would be regarded by the *lex loci celebrationis* as sufficient ground for relief. A not unreasonable conclusion, however, is that he presumed Indian and English law to be the same on the matter.

But the view that a mistake affecting consent is a contractual defect was certainly not accepted by Hodson J. in Way v. Way,¹ the case of the Russian wife who was forbidden by the Soviet authorities to join her husband in England. Doubt raised by Way v. Way 1950.

The petitioner, a British subject domiciled in England, went through a ceremony of marriage at Archangel with the respondent, domiciled in Russia, as the result of which he believed that he had been legally married. He later claimed annulment on the grounds, (1) that certain formalities required by Russian law had been omitted, (2) that the marriage was void for want of consent, since he believed at the time of the ceremony that his wife would be allowed to accompany him to England and also that it was the duty of both parties to live together. According to Russian law he was mistaken in both respects.

Hodson J. first held that there had been no neglect of the Russian formalities. He then propounded the doctrine that 'questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made', with the result that 'the matrimonial law of each of the parties' had to be applied.² He then held that by English law, the personal law of the petitioner, consent is not nullified by mistake of the kind pleaded, a finding with which it is impossible to disagree.

The Court of Appeal³ held the marriage to be void on the ground that the Russian formalities had not been observed, and therefore anything that was said about the law to govern the question of consent was *obiter*. Bucknill L.J. and Denning L.J. made no reference to the matter, but Sir Raymond Evershed M.R. was 'prepared to assume' that Hodson J. was correct in referring the question to the personal law of the parties.⁴

To classify want of consent as a personal defect and to assign it to the law that governs status seems utterly wrong on principle. A valid agreement by the parties to go through a

Submitted that want of consent is a contractual defect

¹ [1950] P. 71.

³ *Sub nom. Kenward v. Kenward*, [1951] P. 124.

² At p. 78.

⁴ At p. 133.

marriage ceremony is an essential preliminary to the creation of the married status. Fundamental error nullifies not only the agreement, but also the ceremony in which it finds its fulfilment, and whether the facts disclose error of that nature must surely be a matter for the law that governs the ceremony, i.e. the law that determines whether a ceremony sufficient to produce a change of status has been effected.¹

Meaning of
'personal
law'

It remains to identify the personal law which governs personal, as distinct from contractual, defects. It seems clear that it must be the law that governs capacity to marry, for, with the exception of absence of consent if that is to be included in the present category, all the personal defects represent an incapacity in one or both of the parties. There is no need to discuss further the controversial question of capacity, but it is as well to repeat that, at least according to the latest dicta, the governing law is the law of the intended matrimonial home, which is presumed to be the law of the country in which the husband is domiciled at the time of the marriage. The most decisive statement to this effect is contained in the following passage from Lord Greene's judgment in *De Reneville v. De Reneville*:²

'In my opinion the question whether the marriage is void or merely voidable is for French law to answer. My reasons are as follows: The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms.³ It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.'

Effect of
De Rene-
ville v. De
Reneville

The crucial sentence in this passage is that which has been italicized, for at first sight the meaning of the word 'this' is not obvious. It is submitted that it clearly means—*this defect*.⁴ Interpreted more fully, Lord Greene's line of thought appears to have been as follows:

¹ *Parojcic v. Parojcic*, [1958] 1 W.L.R. 1280, 1283. For a strong view to the contrary see 3 *J. & C.L.Q.* 454 et seqq. (J. T. Woodhouse). It should also be noticed that the Royal Commission on Marriage and Divorce recommends that only lack of formalities should be regarded as a contractual defect; Cmd. 9678, pp. 234, 395.

² [1948] P. 100, 114. For the facts see *supra*, p. 357.

³ Italics supplied.

⁴ See the remarks of Mr. P. B. Carter in 31 *Journal of Comparative Legislation and International Law*, 92-93 (Nov. 1949).

Whether a marriage is void or voidable depends in the first place upon the particular defect alleged by the petitioner, since the nature of this will determine the identity of the proper law. If the defect consists in lack of form, the proper law is the *lex loci celebrationis*.

But in the present case the alleged defect is inability or refusal to consummate the marriage, and since this raises a question of essential validity the proper law is the law of France, in which country the husband was domiciled at the time of the marriage.

It is pertinent to remark that if chaos is to be avoided in a nullity suit the personal law must be represented by a single legal system, not by the ante-nuptial *lex domicilii* of each party. It is required to answer two questions:

Essential that personal law should be a single system

First, does the alleged defect constitute cause for annulment?

Secondly, if so, what consequences ensue, presuming the allegation to be proved?

The first question might be referred to two laws, but scarcely the second. Suppose, for example, that a woman, domiciled in England prior to her marriage to a man domiciled in Switzerland, alleges that the latter was mentally defective at the time of the marriage. Both English and Swiss law recognize mental infirmity as ground for annulment, but the effect in Switzerland is to render the marriage void, not voidable as in England.¹ If a judge, confronted with this problem, were required to apply the dual domicile theory, how could he reach a decision without choosing either Swiss or English law and upon what basis would he be expected to make the choice?

It must be noticed that the decisive date for ascertaining the personal law is the time of the marriage, not the time of the nullity proceedings, for annulment, unlike divorce, is founded upon an ante-nuptial fact.² This is so even though the alleged defect is the post-nuptial fact of wilful refusal to consummate the marriage.³ This equation of wilful refusal and impotence is often justified on the ground that the former is in essence an ante-nuptial act, since in the case of the husband it is generally a veil concealing impotence, and in the case of the wife it represents unconquerable aversion.⁴

Time for fixing personal law is time of marriage

¹ Wolff, *Private International Law* (1st ed.), citing Swiss Civil Code, ss. 16, 97, 102, no. 2.

² 11 *M.L.R.* 101.

³ *Robert v. Robert*, [1947] P. 164, 167-8.

⁴ Wolff, *Private International Law*, p. 337, citing *G. v. G.*, [1924] A.C. 349. A different view is expressed by Falconbridge, 26 *Canadian Bar Review*, 920.

A statutory
rule for the
choice of
law

The Matrimonial Causes Act, 1950, provides that where a nullity suit is brought in England by a wife, either because she has been deserted by her husband, who was domiciled in this country immediately before the desertion,¹ or because she has been ordinarily resident in England for a period of three years immediately preceding the suit,² then

'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.'³

It would seem that this creates no exception to the rules for the choice of law stated above. The common domicil at the time of the proceedings vitally affects the question of jurisdiction, but it is no pointer to what was the proper law at the time of the marriage. Whatever it is that renders the court competent—common domicil, common residence or the domicil of the petitioner alone—the alleged defect must still be assigned to its proper law, which may well be the law of a foreign country.

3. Foreign Suits

(1) Jurisdiction.

Doubtful
if English
and foreign
courts are
on the same
footing

If the law is to be a harmonious whole it seems essential that what is regarded as sufficient to confer jurisdiction upon the English court should be equally effective in the case of foreign courts. It is not clear, however, that this is true. For one thing, the demands of reciprocity have not always impressed English judges; for another, the relevant decisions are few in number and not wanting in ambiguity. It will be better, therefore, to retain the arrangement followed in the discussion of English jurisdiction and attempt to ascertain whether the authorities justify the conclusion that English and foreign courts stand on the same footing.

(i) Annulment of voidable marriages.

Court of
common
domicil
competent

(a) *Jurisdiction based on domicil.* The decision of the House of Lords in *Salvesen v. Administrator of Austrian Property*⁴ 1927. established beyond all doubt that the court of the country in which both parties are domiciled at the time of the proceedings has jurisdiction to pronounce a decree of nullity.⁵ It is also

¹ *Supra*, p. 358.

³ Matrimonial Causes Act, 1950, s. 18 (3).

⁴ [1927] A.C. 641; for the facts see *infra*, p. 378.

⁵ *De Reneville v. De Reneville*, [1948] P. 100, 109, per Lord Greene.

² *Supra*, p. 362.

established that a decree of nullity pronounced by a court other than the court of the domicile will be recognized, provided that it is regarded as valid and effective by the *lex domicilii* of the parties.¹

There can, of course, be no question of a foreign jurisdiction based on the separate domicile of the wife, for in the case of a voidable marriage she necessarily shares the domicile of her husband. We have seen, however, that in two sets of circumstances a wife may petition the English court for annulment notwithstanding the foreign domicile of her husband,² and the question therefore arises whether a foreign decree, based on a substantially similar jurisdictional ground, will be recognized on the principle of reciprocity. This problem of reciprocal recognition, which assumes greater importance in the sphere of divorce, will be discussed later.³

Does the prior domicile of deserted wife found jurisdiction?

(b) *Jurisdiction based on residence*. Since it has now been held that the common residence of the parties in England suffices to found the nullity jurisdiction of the English court,⁴ it may be taken for granted, in accordance with the principle of reciprocity, that a foreign decree based upon a similar assumption of jurisdiction will be recognized. This conclusion, indeed, was virtually established by the earlier case of *Mitford v. Mitford*.⁵ 1923.

Common residence sufficient

On the other hand, having regard to *De Reneville v. De Reneville*,⁶ it is clear that at common law a foreign decree founded on the residence of the petitioner alone will not be recognized as valid by English law. The one doubt in this respect is whether a decree granted to the wife by reason of her residence in the forum for a limited period will be honoured in England, having regard to the statutory jurisdiction possessed by the English court to grant her relief if she has been resident in the country for three years.⁷

Residence of petitioner alone insufficient

(c) *Jurisdiction based on place of marriage*. The decision of the Court of Appeal in *Casey v. Casey*,⁸ that jurisdiction to annul a marriage for wilful refusal cannot be founded on the

Place of marriage no basis of jurisdiction 1949.

¹ *Abate v. Abate*, [1961] 2 W.L.R. 221. This is an extension to annulment of the doctrine laid down for divorce by *Armitage v. A.-G.*, [1906] P. 135; *infra*, p. 394.

² Matrimonial Causes Act, 1950, s. 18 (1) (a); 18 (1) (b); *supra*, pp. 358; 362.

³ *Infra*, pp. 397-400.

⁴ *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115.

⁵ [1923] P. 130; *infra*, p. 382.

⁶ [1948] P. 100; *supra*, p. 357.

⁷ Matrimonial Causes Act, 1950, s. 18 (1) (b). As to this, see *infra*, pp. 397-400.

⁸ [1949] P. 420; *supra*, p. 363.

bare fact that the parties were married in England, appeared to imply that a foreign decree based jurisdictionally upon marriage in the forum would not be granted extra-territorial recognition.¹ This conclusion, however, is no longer inevitable, for, as we have seen, a later court of Appeal found itself unable to follow *Casey v. Casey*,² and therefore the position must remain uncertain until it has been clarified by the House of Lords.³

(ii) *Annulment of void marriages.*

Common
domicil
found
jurisdiction: (a) *Jurisdiction based on domicil.* In *Salvesen v. The Administrator of Austrian Property*,⁴ the House of Lords held that jurisdiction in the international sense is possessed by the courts of the foreign country if the parties to a void marriage are both domiciled there at the time of the suit. This common domicil will not, of course, exist unless the woman has by residence acquired a domicil of choice in the forum, for her previous domicil is unaffected by a marriage that is void. In the *Salvesen Case*:

facts: Miss Salvesen, a British subject domiciled in Scotland, went through a form of marriage at Paris in 1897 with an Austrian subject. The parties lived together as man and wife at Wiesbaden until 1923, except for the period of the 1914 War, and they each acquired a German domicil. In 1923 the English Administrator of Austrian Property claimed the movables of the wife on the ground that she had become an Austrian subject by her marriage. She therefore took steps to discard her Austrian nationality by suing for nullity at Wiesbaden on the ground that certain formalities required by French law had been omitted from the marriage ceremony in Paris. The court granted the decree.

The House of Lords held that the decree was effective in Scotland. The court of the common domicil, though perhaps its jurisdiction may not be exclusive,⁵ is certainly competent to determine conclusively and finally a question relating to the status of the parties. In *De Massa v. De Massa*⁶ and in *Galene v. Galene*⁷ this principle was applied to cases where the court of the common foreign domicil had annulled a marriage for the non-observance of the domiciliary forms, although the parties had married in England in faithful compliance with the English formalities.

¹ *Travers v. Holley*, [1953] P. 246, at p. 256, *per* Hodson L.J. (the statement referred to divorce decrees).

² *Ross-Smith v. Ross-Smith*, [1961] 2 W.L.R. 71.

³ See *supra*, pp. 364-6.

⁵ *Per* Lord Haldane, at pp. 652, 654.

⁶ (1931), reported in [1939] 2 All E.R. 150 N.

⁴ [1927] A.C. 641.

⁷ [1939] P. 237.

In deciding whether the parties were in fact both domiciled in the foreign forum at the time of the nullity proceedings, it is vital that the English court should have regard to the appropriate rule for the choice of law governing the formal validity of the marriage. This is well illustrated by *Chapelle v. Chapelle*.¹

Place of
common
domicil
may depend
upon rule
for choice
of law

1950.

A woman domiciled in England was married in 1931 at a register office in England to a man domiciled in Malta. The Maltese court in 1944, in a suit brought by the husband, pronounced the marriage to have been null and void *ab initio*, since there had been no religious ceremony as required by the *lex domicilii* of the husband.

In proceedings taken later in England it was argued *inter alia* that the Maltese domicil of the husband was automatically communicated to the wife by the mere fact of the marriage and that therefore the nullity decree was effective as having been granted by the court of the common domicil. Willmer J., however, held that it was impossible to attribute to the marriage a change in the woman's domicil, since the Maltese court itself had declared that the parties had never been married. The all-important question of choice of law, however, was not fully canvassed. A void marriage admittedly does not effect a change in the woman's domicil, but in the instant circumstances it is submitted with respect that the marriage was valid, not void. This has been demonstrated by a learned commentator.²

The invalidity of the marriage was alleged to be due to a contractual defect, namely, a failure to observe the correct formalities. The proper law to govern this matter was English law as being the *lex loci celebrationis*. Since the English formalities had been observed, the marriage was valid and the wife acquired by operation of law a common domicil with her husband.

The question that still lacks a judicial answer is whether, in the case of a void marriage, English law admits the international validity of a nullity decree granted by the court of the country in which the petitioner, but not the respondent, is domiciled.

Is domicil
of peti-
tioner alone
a basis of
jurisdiction?

If, for instance, in *Chapelle v. Chapelle*¹ the English formalities had not been observed, with the result that the husband alone was domiciled in Malta, would the Maltese decree have been effective?

Willmer J. virtually answered this question in the negative,

¹ [1950] P. 134.

² Mr. Rupert Cross, 3 *I.L.Q.* 249-50. For a different appraisal of the situation, see 74 *L.Q.R.* 230-2 (J. K. Grodecki).

for he said that the possession by the parties of a common Maltese domicil was 'the *one and only* ground on which the claim to exercise jurisdiction over the wife could be based'.¹ The opinion of the learned judge, however, is not decisive, for the claim that the domicil of the husband at the time of the Maltese suit was alone sufficient to found jurisdiction was not put forward.

Peti-
tioner's
domicil
presumably
sufficient

It is submitted that cogent reasons can be advanced in favour of conceding jurisdiction to the court of the domicil of the petitioner alone. In the first place, the English court assumes jurisdiction on this ground,² and it seems a little incongruous, to say the least, that the equivalent right of foreign courts should be denied. Again, if a void marriage is a complete nullity and can be so treated by every court and every private person, what possible reason can there be for refusing recognition to a decree recording its non-existence and granted in the domicil of one of the parties?³ It smacks of pedantry to reject the declaration of an admitted truth. Further, on mere sociological grounds recognition of the foreign decree seems imperative, for its repudiation creates yet another instance of that lamentable situation in which the parties are regarded as married in one country but unmarried in another.⁴ Finally, it is not without significance that in a case where the facts were similar to those in *Chapelle v. Chapelle* a South African court had no hesitation in recognizing the foreign decree.⁵

Residence
in the
forum of
petitioner
semble
sufficient

(b) *Jurisdiction based on residence.* It may be assumed with some confidence that the foreign annulment of a void marriage, based on the local residence of both parties or of the petitioner alone, will be regarded in England as a decree given by a court of competent jurisdiction. In the first place, since Sir Henry Duke in *Mitford v. Mitford*⁶ recognized the annulment by a German court of a voidable marriage which was based on the residence of both parties in Germany, then *a fortiori* the same basis of jurisdiction must be admitted in the case of a void marriage.⁷ Secondly, the reasons already given in favour of

¹ *Chapelle v. Chapelle*, at p. 144.

² *White v. White*, [1937] P. 111, as explained in *De Reneville v. De Reneville*, [1948] P. 100, at p. 113; *Mehta v. Mehta*, [1945] 2 All E.R. 691; *supra*, pp. 366-7.

³ 3 I.L.Q. 253.

⁴ *Ibid.*, at p. 252.

⁵ *De Bono v. De Bono* (1948), S.A.L.R. 802.

⁶ [1923] P. 130; *infra*, p. 382.

⁷ In *Corbett v. Corbett*, [1957] 1 W.L.R. 486, see the following paragraph, the common residence of the parties in the foreign forum was an alternative ground for the decision.

admitting the jurisdiction of the English court in respect of a void marriage, even though the petitioner alone is resident in England, apply *mutatis mutandis* to a suit abroad and their repetition here would be without profit.¹

(c) Jurisdiction based on place of marriage. Although the matter was scarcely doubtful, it was eventually decided by *Corbett v. Corbett*² that a foreign nullity decree, based upon a ground that renders the marriage void, is effective in the eyes of English law if given by the court of the *locus celebrationis*. Place of marriage founds jurisdiction

(2) *Choice of law.*

The question may be put whether the failure of a foreign court of competent jurisdiction to apply the appropriate rule for the choice of law as understood in England renders its decree ineffective. This much, at any rate, is clear, that a nullity decree in respect of either a void or a voidable marriage, if given by the court of the common domicile, must be recognized whatever rule for the choice of law may have been applied. Decree in common domicile effective, though proper law not applied

1931- *De Massa v. De Massa*³ is a striking illustration of this:

A marriage solemnized in due form at the Paddington Registry Office, between parties who were French by nationality and by domicile, was annulled in France on the grounds that:

- (a) the petitioner had not obtained the parental consent required by French law; and
- (b) the marriage had not been recorded in the French register.

Lord Merrivale accepted the French decree as binding. 'A French tribunal', he said, 'of competent jurisdiction has annulled the marriage and that declaration of nullity comes into operation.' He was not disturbed by the fact that the French court had ignored the fundamental rule that the *lex loci celebrationis* governs the form of the marriage ceremony.

There is nothing startling in this decision. It complies with the established rule that a foreign judgment, if given by a court possessing jurisdiction in the international sense, is binding in England and cannot be impeached on its merits.⁴ When sued upon in this country it cannot be successfully attacked on the ground that the court mistook or misapplied the relevant legal system, whether English or foreign.⁵ The decisive factor is the jurisdiction of the foreign court. In the case of a suit *in rem*, Merits of decree in common domicile cannot be impeached

¹ *Supra*, pp. 367-9.

² [1957] 1 W.L.R. 486.

³ (1931), reported [1939] 2 All E.R. 150 N; followed in *Galene v. Galene*, [1939] P. 237.

⁴ *Infra*, pp. 661-7.

⁵ *Godard v. Gray* (1870), 6 Q.B. 139, *infra*, p. 664.

jurisdiction resides in the court of the country where the *res* is situated.¹ A nullity suit is a proceeding *in rem* and it cannot be gainsaid that the *res*, to wit the marriage, is situated in the country in which both parties are domiciled.

Is the same
true of de-
crees given
in country
of resi-
dence?

Doctrinal theory, however, is not so easily satisfied when the decree has been given by some court other than the court of the common domicil, as for example by the court of the common residence of the parties.² This extension of jurisdiction from domicil to residence is no doubt convenient, but doctrinally it is vulnerable, for if the test of jurisdiction in proceedings *in rem* is the situation of the *res*, is it logical to ascribe to the marriage, albeit a disembodied *res*, a simultaneous situation in more countries than one? That logic is not always a sure guide, however, is best illustrated by Mitford v. Mitford,³ where the facts were as follows: 1923

Mitford v.
Mitford
admits
sufficiency
of common
residence

Mitford, domiciled in England, was married in Berlin to a woman with a German domicil. After six months of married life his wife obtained a nullity decree from the Berlin court on the ground of error under article 1333 of the German civil code. This provides that the validity of a marriage may be disputed by a spouse who, at the time of the ceremony, is mistaken as to such personal attributes of the other spouse as would have prevented him or her, with an intelligent appreciation of the significance of matrimony, from contracting the marriage. The particular attributes of which Mrs. Mitford complained were the masculine indolence and the unbearable selfishness of her husband. The effect in German law of this *error qualitatis* is to render the marriage voidable. The wife married again, whereupon Mitford petitioned the English court for divorce because of her bigamy and adultery.

The first question on these facts, whether the German court possessed nullity jurisdiction by virtue of the common residence of the parties, was answered in the affirmative by the President. The second question was whether the decree, given for a reason manifestly insufficient by the English law of the domicil, was to be recognized as valid. Was an alteration of status, inadmissible by the personal law, to be permitted merely because it had been effected by a court of competent jurisdiction? The President again gave an affirmative answer. He took the line that the decree, being a judgment of a competent court, was as conclusive as a like judgment in any other civil proceedings, that is to say, its propriety and correctness could not be impeached,

¹ *Supra*, p. 110; *infra*, pp. 654-7.

² [1923] P. 130.

³ *Supra*, p. 380.

for it is a settled rule of English private international law that foreign judgments are not void even though erroneous.¹ He said:

"The . . . real ground of challenge seems to me to be that . . . the decision was wrong on the merits. Into that question I am, as I think, not entitled to go."²

It is true that in the view of the learned judge the correct rule for the choice of law had been applied by the German court, for rightly or wrongly he equated the mistake of the wife with an initial absence of consent—a contractual defect that in his opinion fell to be tested by the *lex loci contractus*. The following hypothetical case will perhaps demonstrate the difficulty in a more acute form.

A Cypriot, a member of the Greek Orthodox Church, marries an Englishwoman in London in due compliance with the English formalities. The parties have been domiciled in England since the ceremony, but for the last six months they have resided in Malta. The Maltese court grants a decree of nullity on the ground that a Greek priest was not present at the marriage ceremony.

Is this decree, granted in defiance of the rule that English law governed the form of the ceremony, to be recognized as valid? It would seem, despite *Hay v. Northcote*,³ that the doctrine which forbids the impeachment of a foreign judgment must prevail, and that the validity of the decree must be acknowledged. In short, if English law admits the jurisdiction of the court of the common residence, it must abide by the consequences, however erroneous the decree may be.

Seemle,
erroneous
decrees not
impeach-
able

(B) SUITS FOR DISSOLUTION OF MARRIAGE⁴

(a) *Jurisdiction of English courts.* The test of jurisdiction for the purpose of granting divorce was not unequivocally established until the decision of the Privy Council in *Le Mesurier v. Le Mesurier* in 1895.⁵ There was a tendency before that time

Jurisdic-
tion
formerly
based on
residence
short of
domicil

¹ *Infra*, pp. 661-7.

³ [1900] 2 Ch. 262.

² [1923] P., at p. 142.

⁴ By English law, divorce may be granted at the instance of either husband or wife when the respondent has (a) committed adultery or (b) deserted the petitioner without cause for at least three years immediately preceding the presentation of the petition or (c) treated the petitioner with cruelty, or (d) is incurably of unsound mind and has been continuously under care and treatment for at least the last five years; and at the instance of the wife if the husband since the marriage has been guilty of rape, sodomy, or bestiality; Matrimonial Causes Act, 1950, s. 2 (2).

⁵ [1895] A.C. 517.

to propound a doctrine of matrimonial domicile, an expression which was intended to indicate, not residence in a country with a present intention of remaining there indefinitely, but the actual residence of the spouses for the time being, provided that it was neither casual nor for the mere purpose of travel. Thus in *Niboyet v. Niboyet*,¹ which was decided in 1878, a Frenchman, who had been married to an Englishwoman at Gibraltar in 1856, resided in England as French Consul from 1862 to 1869, and again from 1875 until the presentation by his wife of a petition for divorce on the ground of his adultery. His consular office precluded him from acquiring an English domicile. A majority of the Court of Appeal, Brett L.J. dissenting, held that there was jurisdiction to dissolve the marriage. The reasoning appears to have been that, since the husband was resident in England, his adultery was a matrimonial matter that would have entitled the ecclesiastical courts before 1857 to exercise jurisdiction in a suit for divorce *a mensa et thoro*, and that the jurisdiction, enlarged by the new remedy of divorce, was exercisable by the civil court.

One fallacy at least in this reasoning was that what gave jurisdiction in the matters cognizable by the ecclesiastical tribunals would not affect the entirely new power of dissolution that had been created by the Act.

Domicil is
now the
only test of
jurisdiction

However, the doctrine that residence short of domicile suffices to render an English court competent to decree divorce was definitely and finally exploded by the decision of the Privy Council in *Le Mesurier v. Le Mesurier*.² That case decided that domicile, in the true and full sense of the term, of the husband at the time of the suit is the sole test of jurisdiction. With such domicile the court has jurisdiction over a foreigner as well as over a British subject; without such domicile it has no jurisdiction, even though the parties are British subjects.³

Time at
which
common
domicil
must exist

*Travers v. Holley*⁴ seems clearly to support the view that the critical moment at which the test of domicile must be satisfied is the time when the proceedings are commenced, not at the later time when the case is tried. If the rule were otherwise, indeed, a husband would be able to frustrate his wife by changing his

¹ (1878), L.R. 4 P.D. 1; Morris, op. cit., p. 105.

² [1895] A.C. 517. Other authorities are: *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435; *Goulder v. Goulder*, [1892] P. 240; *Lord Advocate v. Jaffrey*, [1921] A.C. 146; *A.-G. for Alberta v. Cook*, [1926] A.C. 444; *H. v. H.*, [1928] P. 206.

³ *Niboyet v. Niboyet* (1878), 4 P.D. 1, 19, per Brett L.J. diss.

⁴ *Infra*, p. 397.

domicil between the presentation of her petition and the hearing of the case. Further, to regard the critical time as the time of the trial and judgment, if pressed to its logical conclusion, might lead to absurdity, for a husband of sufficient wealth and malice would be able to defeat his wife in perpetuity. An act in the law, once duly effected, must be allowed to operate.¹

Since a wife takes the domicil of her husband upon marriage, the sole question in each case is whether the husband is domiciled in England at the time of the suit. Nothing else is relevant. The nationality of the parties, their residence,² their submission to the jurisdiction,³ their former domicils, or the fact that they were domiciled elsewhere when the misconduct upon which the suit is founded occurred⁴—none of these is pertinent to the existence of jurisdiction.

Domicil of husband alone considered

Moreover, it is impossible for the wife to acquire during the subsistence of the marriage a different domicil from that of her husband.⁵ Even a decree of judicial separation does not confer this liberty upon her.⁶ It thus follows that a wife is incapable at common law of obtaining relief in the shape of a divorce from the English court unless she can show that her husband is at present domiciled in England. This doctrine has produced the problem of the deserted wife. A domiciled Englishwoman, for instance, marries in England a man domiciled abroad, but after a period of cohabitation with his wife the husband forms an adulterous union with another woman and leaves the country with her. The wife is confronted with a distressing and a formidable problem. Since she necessarily retains the domicil of her husband, her only remedy lies in the country of that domicil. This may be at the other end of the world. It may be a country where divorce is not allowed at all, or not allowed for reasons that seem compelling to English eyes. Even the continued residence of the husband in England does not improve matters, much less mend them. If, to take the fact of the *Niboyet Case*,⁷ the domiciled Frenchman lives in

The problem of the deserted wife

¹ The view in the text is supported by *Balfour v. Balfour*, [1922] W.L.D. 133 (South Africa); and by certain Australian decisions, but is repudiated by *Kerrison v. Kerrison* (1952), 69 W.N. (N.S.W.), 305. For a discussion of these cases and of the subject generally see 2 *I. & C.L.Q.* 303-8 (J. G. Fleming).

² *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.

³ *Harriman v. Harriman*, [1909] P. 123, 131, 142, 144; *Hyman v. Hyman*, [1929] P. 1, 31; *Armitage v. A.-G.*, [1906] P. 135, 140.

⁴ *Wilson v. Wilson* (1872), L.R. 2 P. & D. 435.

⁶ *A.-G. for Alberta v. Cook*, [1926] A.C. 444.

⁵ *Supra*, p. 192.

⁷ *Supra*, p. 384.

England in adultery for some twenty years, the English court is powerless to dissolve the marriage. The wife must face the trouble and expense of taking her chance in the French court. The same situation arises if the husband, though possessing an English domicil at the time of the marriage, has now acquired a fresh one abroad. Even worse, perhaps, is the case where he disappears completely, so that the wife, able and willing maybe to meet the expense of pursuit, cannot even ascertain her present domicil.

Tendency
of earlier
decisions
to give a
remedy by
relaxing
the general
principle

The judges several times expressed the view that a wife enmeshed in these difficulties should be allowed to claim her own separate domicil in England.¹ Sir Gorell Barnes, for instance, in *Bater v. Bater*² put the position as follows:

'In a case such as this it is said that the wife could maintain a suit in this country against a husband who has separated and gone to America and become domiciled there; and there are many cases in which that has been allowed in undefended cases. I am not at the present moment aware . . . how that matter would be treated if the case were really put on the domicil of the husband abroad. But in many of the undefended cases what happens is, that the wife is deserted in England. The husband goes to America, nothing is heard about him, and the court, in order to do justice, either acts upon the view that the husband has not come forward to prove another domicil, when he deserted his wife in this country; or, as some have thought, that a woman may be treated as having been left in a separate domicil of her own, and, to do justice, she is not bound to follow the husband all over the world from place to place, and so may get relief in this country.'

In the two cases of *Stathatos v. Stathatos*³ and *Montaigu v. Montaigu*⁴ these suggestions were translated into action. In the former:

A Greek, domiciled in Greece, married a Miss Henry, domiciled in England, at a Registry Office in London. Three years later he took her to Athens, but after about a year refused to live with her any longer and sent her back to England. He then obtained from a court at Athens a decree of nullity on the ground, inadequate according to English law, that there was no Greek priest present at the marriage ceremony in London.

The wife was here presented with a peculiarly intractable riddle. She could not petition for divorce in Greece, since her marriage

¹ *Niboyet v. Niboyet* (1878), 4 P.D. 1, 14; *Armystage v. Armystage*, [1898] P. 178, 185; *Bater v. Bater*, [1906] P. 209, 215-16; *Ogden v. Ogden*, [1908] P. 46, 82.

² *Supra*, at pp. 215-16.

³ [1913] P. 46.

⁴ [1913] P. 154.

was non-existent by Greek law;¹ she could not petition in England, since her domicil was Greek. Bargrave Deane J., however, though admitting that he was infringing a well-established principle, and registering a pious hope that his decision would not be treated as a precedent, held that the wife possessed a domicil in England sufficient to enable her to obtain a divorce.

Despite these two decisions, however, the suggested doctrine that divorce might exceptionally be obtained in some country other than the true domicil of the husband was later repudiated. Though not directly in issue it was adversely criticized by the Privy Council in *A.-G. for Alberta v. Cook*² and was destroyed by the later decisions in *H. v. H.*³ and *Herd v. Herd*.⁴

Modern cases apply the test of domicil rigorously

In *H. v. H.* two domiciled English persons married each other in England in 1915, but were judicially separated six years later. The wife brought the present suit for divorce. The husband protested the jurisdiction on the ground that he was now domiciled in France. The wife pleaded that this defence was not open to him, her arguments being that a husband domiciled in England who deserts his wife is estopped from pleading a different domicil, and also that a wife so deserted is entitled to determine in what forum divorce proceedings shall take place.

Lord Merrivale overruled this plea and directed that an inquiry should be held to identify the husband's domicil. If this was French there could be no divorce proceedings in England. The learned judge affirmed once more that jurisdiction to decree divorce depends solely upon the actual domicil of the husband at the time of the proceedings, and that a man who deserts his wife in one domicil is not estopped from asserting that he has later become domiciled elsewhere. Statements such as those made by Gorell Barnes J., that in undefended cases departures from strict principle had been tolerated in order to afford a remedy to an afflicted wife,⁵ were characterized as indicating merely the practice of the court and not a rule of law. In *Herd v. Herd*⁴ it was held that the foreign domicil of the husband defeats the petition of the wife, even though the former does not protest the jurisdiction of the English court.

In recent years, however, four developments, two judicial two legislative, have to a large extent mitigated the hardship

Cases in which deserted wife is relieved

¹ The nullity decree, though granted by the court of the common domicil, was not at that time regarded as effective in England. It would be so regarded now, *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *supra*, p. 381.

² [1926] A.C. 444.

⁴ [1936] P. 205.

³ [1928] P. 206.

⁵ *Supra*, p. 386.

suffered by a deserted wife. These have already been mentioned but they may usefully be repeated.

Foreign nullity decree (i) A wife is restored to the status of an unmarried person if her marriage has been annulled by the foreign court of the common domicil.¹ Thus, if the facts of *Stathatos v. Stathatos*² were to recur now, there would be no necessity for the wife to seek matrimonial relief in England.

Former English domicil sometimes presumed to continue (ii) The hardship that arises from the total disappearance of the husband scarcely embarrasses the wife's right of action if the last-established domicil was English, for, at any rate in undefended cases, the court is usually satisfied with a deposition that the domicil is unchanged. The existing domicil is presumed to continue, and the onus of rebutting this lies on the party who alleges a change.³

The importance of the following two legislative developments lies not so much in the relief that they afford to the deserted wife, but in their disruption of the common law principle that nothing but the domicil of the parties in England confers divorce jurisdiction upon the court.

Matrimonial Causes Act, s. 18 (i) (a) (iii) Section 18 (1) (a) of the Matrimonial Causes Act, 1950, provides that the court shall have jurisdiction to entertain divorce proceedings if they are instituted by a wife and

if she has been deserted by her husband, or if her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and her husband was immediately before the desertion or deportation domiciled in England.⁴

The weakness of this enactment is that it cannot be invoked by the wife merely because her pre-marriage domicil was English. Her husband, and therefore she herself, must have been domiciled in England at the time when he left the country.

Matrimonial Causes Act, s. 18 (i) (b) (iv) Section 18 (1) (b) of the same Act also gives divorce jurisdiction to the court if the wife is the petitioner and

if she is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or the Channel Islands or the Isle of Man.⁵

¹ *De Massa v. De Massa*, [1939] 2 All E.R. 150 N; *Galene v. Galene*, [1939] P. 237; *supra*, p. 381.

² *Supra*, p. 386.

³ Cp. *Hopkins v. Hopkins*, [1951] P. 116.

⁴ Re-enacting the Matrimonial Causes Act, 1937, s. 13.

⁵ Re-enacting the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1. Similar legislation is in force in Scotland, Northern Ireland, Australia, New

It will be noticed that the wife must be resident in fact in England at the time of her presentation of the petition and must also have been 'ordinarily resident' there during the last three years. The precise meaning of the expression 'ordinarily resident' has caused a little difficulty and one judge went so far as to say that the adverb adds nothing to the adjective.¹ It seems clear, however, that the word 'ordinarily' is used deliberately in order to distinguish the wife's physical presence in England at the time of the proceedings from her habitual residence during the preceding three years. Habitual or ordinary residence does not connote continuous physical presence, but physical presence with some degree of continuity, notwithstanding occasional and temporary absences.²

Meaning of
'ordinarily
resident'

Each case must, of course, depend upon its own peculiar facts, but the authorities show that even absence for a considerable time will not terminate a person's habitual residence if it is due to some specific and unusual cause, as for instance when a wife accompanies her husband during his employment in a foreign country.³ Again, the significance of a comparatively prolonged absence will be weakened if, during the relevant period, the wife has maintained a house or flat in England ready for immediate occupation, for one of the tests of her ordinary or habitual residence is the location of her real home.⁴

One regrettable feature of this provision is that it does not avail the husband. A man who has been present in England for only a brief period, but with the intention of remaining there permanently, may obtain a divorce on the basis of his domicile, but if he has resided there for many years without that intention, he is remediless in the English courts. What is even more regrettable is that any wife in the world may avail herself of the enactment. In the words of Sachs J.:

S. 18 (1) (b)
avails
wives
of all
countries

'It provides that women of all countries can, after three years' residence here, obtain a divorce under the law of this country irrespective

Zealand and Southern Rhodesia. In at least six continental countries, in New Zealand, in each of the states of Australia, and in those provinces of Canada where divorce is recognized, a wife if deserted is allowed to petition, despite the lack of a separate domicile, for the purpose of obtaining matrimonial relief; 61 *L.Q.R.* 366-8.

¹ *Hopkins v. Hopkins*, [1951] P. 116.

² *Levene v. Inland Revenue Comrs.*, [1928] A.C. 225, 232.

³ *Stransky v. Stransky*, [1954] P. 428; *Lewis v. Lewis*, [1956] 1 W.L.R. 200.

⁴ *Ibid.*

of their domicil and irrespective of the fact that their husbands have never visited the country and have never had the remotest link with it. Its provisions are thus calculated to attract to this country women who have been born, brought up, married and lived in the country of their husband's domicil, and to whom the continued application of the matrimonial law of that country might not seem unduly unreasonable. It lays down that the courts of this country are thus to give decrees of divorce that, as in the present case, would not necessarily be recognized in the country of domicil, and may also not be recognized in many other civilized countries.¹

S. 18 (1)
(b) avails
a respondent
wife

The right of a wife to invoke section 18 (1) (b) is not restricted to the normal case where she herself petitions for divorce. If, for instance, a husband is the petitioner and his petition fails because he is not domiciled in England, his wife may rely upon her residence in England and, either by a prayer in her answer or by a cross-petition, may allege a matrimonial offence committed by him and thus obtain a decree of divorce.² On the other hand, since the object of the sub-section is to accommodate wives and wives only, if a petitioner avails herself of it but fails to prove her allegations, it is not open to her husband to counterclaim for relief upon the ground of her misconduct.³

Jurisdiction
to grant
a decree of
presumption
of death and
divorce

Another occasion on which an English court may dissolve a marriage between persons domiciled abroad arises where a suit is brought for a decree of presumption of death of one of the parties and for the dissolution of the marriage. Section 8 of the Matrimonial Causes Act, 1937, allowed any married person, who alleged reasonable grounds for supposing that the other party was dead, to petition the court not only to have it presumed that such party was dead, but also to have the marriage dissolved. Strictly speaking, once a person is dead in the eyes of the law, it is superfluous to dissolve his marriage, but nevertheless its express dissolution is desirable to meet the contingency of the presumption being in fact wrong. In *Wall v. Wall*,⁴ the question arose whether this annexed power of divorce was exercisable in favour of a wife if her husband, when last heard of, was domiciled abroad. The answer depended

¹ *Tursi v. Tursi*, [1957] P. 54 at p. 57. Thus in this case, the judge had no option but to grant a decree of divorce to the wife of a man domiciled in Italy (who had been in desertion for three years), although divorce is not a remedy recognized by Italian law.

² *Russell v. Russell and Roebuck*, [1957] P. 375; *Levett v. Levett and Smith*, [1957] P. 156.

³ *Russell v. Russell and Roebuck*, *supra*.

⁴ [1950] P. 112.

upon whether the essential nature of a proceeding under the section was a suit for divorce. If so, the court had no jurisdiction. Pearce J. held, and it is respectfully submitted rightly so, that a petition for presumption of death is not in substance a petition for divorce.

'In my view,' he said, 'relief under s. 8 is not primarily or in essence dissolution of marriage, and was not intended to be so. The dissolution was added as a safeguard. The risk that in certain cases the presumption may be incorrect so that the safeguard will then come into operation and effect an alteration of status in respect of a person domiciled abroad was not in my opinion intended by the legislature to deter this court from accepting jurisdiction and should not prevent its doing so.'¹

The result was that jurisdiction was sufficiently founded upon the mere residence of the petitioner. This ruling might have embarrassing consequences if, for example, the petitioner were the wife of a man who when last heard of was domiciled in Scotland, for she might be able by crossing the border to obtain a divorce that would not be available to her under the Scottish statute, which is couched in different terms from those of its English equivalent.² It is, perhaps, for some such reason that limitations were later put upon the jurisdiction of the English court.³ The present rule is that the court has jurisdiction in proceedings for a decree of presumption of death and dissolution of marriage where

- (a) the petitioner is domiciled in England, or where
- (b) the wife petitioner is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.⁴

A copy of every petition for divorce must be served personally or by registered post upon the respondent and every co-respondent,⁵ and there is no need to obtain the leave of the court for service out of the jurisdiction.⁶ The court in its discretion, however, may dispense with service altogether if it seems necessary or expedient so to do.⁷ This discretion is

¹ [1950], P. 112 at p. 125.

² Divorce (Scotland) Act, 1938, s. 5.

³ Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (3) (b).

⁴ Matrimonial Causes Act, 1950, s. 16 (1); *ibid.*, s. 18 (2). In order to determine whether a wife is domiciled in England for the purposes of this section, 'her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living'; s. 16 (4).

⁵ Divorce Rule 8 (1) (a).

⁶ Divorce Rule 10.

⁷ Matrimonial Causes Act, 1857, s. 42.

unfettered, but it will be exercised in favour of the petitioner only in exceptional cases, as, for instance, when the possible methods of substituted service are likely to be ineffective.¹

Jurisdiction over co-respondent not based on domicile

The jurisdiction of the court over a co-respondent, guilty of adultery with a married woman, is wider than it is over the immediate parties to a suit for divorce, for it extends to every person, other than a foreign sovereign, regardless of his nationality, domicile or residence, provided that the petitioner and respondent are themselves domiciled in England.² The co-respondent cannot claim to be dismissed from the suit on the ground that he is not domiciled in England, though, of course, if it should happen that he is resident abroad without possessing any assets in this country a judgment for damages given against him may be ineffective.

The Matrimonial Causes Act, 1950,³ provides that a husband may, on a petition for divorce or for judicial separation or *for damages only*, claim damages from any person on the ground of adultery with the wife of the petitioner. Such a claim is to be tried on the same principles as actions for criminal conversation were tried under the law before 1857.⁴ These actions were merely personal claims for a wrong, not complicated by questions of status,⁵ and therefore a husband, so far as regards his right to sue the alleged adulterer in England for damages *simpliciter*, is in the same position as any other plaintiff in tort. If he has divorced his wife for adultery in the country of his foreign domicile, he may, notwithstanding that he is neither domiciled nor resident in England, maintain an action in the High Court to recover damages from the adulterer.⁶

English law applies exclusively in English suit

✓ Choice of Law. The questions that arise in a suit for divorce properly brought in this country are governed exclusively by English law. This decides whether there is good cause for divorce, and determines the form of relief and the conditions upon which the decree will be made. Any other legal system, such as the law under which the parties married, or their *lex*

¹ *Luccioni v. Luccioni*, [1943] P. 49 (no dispensation); *Weighman v. Weighman*, [1947] 2 All E.R. 852 (dispensation); *Paolantonio v. Paolantonio*, [1950] 2 All E.R. 404 (dispensation). *Spalenkova v. Spalenkova*, [1954] P. 141 (no dispensation). Different considerations are relevant in the case of a petition for presumption of death and divorce; *N. v. N.*, [1957] P. 385.

² *Rayment v. Rayment*, [1910] P. 271; *Rush v. Rush*, [1920] P. 242.

³ S. 30 (1).

⁴ *Ibid.*, s. 30 (2).

⁵ *Rayment v. Rayment*, [1910] P. 271, 286.

⁶ *Jacobs v. Jacobs and Ceen*, [1950] P. 146.

patriae or the law of the place where the matrimonial offence was committed, is completely irrelevant.

Since the question whether the court will dissolve a marriage is one that 'touches fundamental English conceptions of morality, religion and public policy',¹ and one that is governed exclusively by rules and conditions imposed by the English legislature,² it seems clear that English law is applied as being the *lex fori*, not the *lex domicilii*.³ The question which of these laws is applicable becomes acute where the court possesses jurisdiction on some ground other than domicile.

Suppose, for instance, that an Italian national, domiciled in England, after marrying an Englishwoman, is deported from the country and thereupon reverts to his Italian domicile.

In these circumstances the Matrimonial Causes Act, 1937,⁴ gave the English court jurisdiction in divorce, but it did not impose a rule for the choice of law. The circumstances arose in *Zanelli v. Zanelli*⁵ and the court, applying English domestic law granted the wife a decree, despite the rule of the Italian law of her domicile that divorce is not permissible. This particular type of case and also the case where the court has jurisdiction if the wife, though domiciled abroad, has resided in England for the last three years⁶ no longer raise the problem, for the Act of 1950 specifically provides that 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings'.⁷ In a suit for divorce, this means that English law must be applied without exception, though, as we have seen, this is not necessarily so in a suit for nullity.⁸

↓ (b) *Jurisdiction of foreign courts*. The fundamental doctrine at common law, that remained undisturbed until *Travers v. Holley* in 1953,⁹ is that just as the English courts refuse to entertain a suit for dissolution of marriage unless the parties are domiciled in England, so do they deny that anything short of domicile enables a foreign court to pronounce a decree that will be recognized in England.¹⁰ Domicile is sufficient, even though

English law
applies as
being the
lex fori

Divorce
jurisdiction
of foreign
court
depends
solely upon
domicile

¹ Wolff, p. 374.

² Dicey, p. 302.

³ But see Graveson, *The Conflict of Laws*, 447-8; also his articles in 28 *B.Y.B.I.L.* 278-9, and 37 *Transactions of the Grotius Society*, 168.

⁴ S. 13; now contained in Matrimonial Causes Act, 1950, s. 18 (1) (a), *supra*, p. 388.

⁵ (1948), 64 *T.L.R.* 556.

⁶ Matrimonial Causes Act, 1950, s. 18 (1) (b), *supra*, p. 388.

⁷ *Ibid.*, s. 18 (3).

⁸ *Supra*, p. 376.

⁹ *Infra*, p. 397.

¹⁰ *Harvey v. Farnie* (1880), 5 *P.D.* 153; (1882), 8 *App. Cas.* 43; *Bater v.*

the marriage was celebrated in England between British subjects;¹ nothing less than domicile is sufficient, even though the parties are foreigners who were married abroad. Neither residence, nor nationality, nor the submission of the respondent to the proceedings² suffices to render a court competent. A decree of divorce granted by a court of any country which is not the bona fide and true domicile of the parties is valueless in England (unless indeed its effectiveness is recognized by the *lex domicilii*),³ and if relied upon here as a justification for a second marriage may lead to a prosecution for bigamy.⁴

All decrees
recognized
by *lex*
domicilii
also recog-
nized in
England

The law of the domicile in this connexion means the system of law that would be regarded as applicable by the courts of the domicile.⁵ This is one of the few cases in which the doctrine of *renvoi* finds a place in English law. A decree of divorce obtained in a country foreign to the domicile, upon a ground that would be insufficient by the internal law of the domicile but which is recognized as valid by the private international law of the domicile, is effectual in England. Or, to put it in another way, if the court of the domicile recognizes the jurisdiction of a court in another country, a decree given by the latter is valid in England.⁶ The question arose in *Armitage v. A.-G.*⁷

The English wife of an American citizen domiciled in New York, after residing for 90 days in South Dakota, obtained a decree of divorce from the court of that State on the ground of her husband's desertion.

Bater, [1906] P. 209; *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Lankester v. Lankester*, [1925] P. 114.

¹ *Harvey v. Farnie*, *supra*. In *Lolley's Case* (1812), 2 Cl. & F. 567 (N), it was said that no sentence of a foreign court could dissolve an English marriage for grounds on which it was not dissoluble by English law. This statement, however, must be confined to the facts, which were that the Scottish courts had granted a divorce to parties who were not domiciled in Scotland. See *Shaw v. Gould* (1868), L.R. 3 H.L. 55; *Niboyet v. Niboyet* (1878), L.R. 4 P.D. 1, at pp. 15-16, *per* Brett L.J.; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 657, *per* Lord Haldane. The decision is too old to be of value. In 1812 the English courts could not grant a decree of divorce, and the modern principle that domicile is omnipotent in matters of personal status was not fully developed.

² *Papadopoulos v. Papadopoulos*, [1930] P. 55; *infra*, p. 407; *Armitage v. A.-G.*, [1906] P. 135, 140.

³ *Armitage v. A.-G.*, *supra*, discussed *infra*.

⁴ *Green v. Green*, [1893] P. 89; *Trial of Earl Russell*, [1901] A.C. 446.

⁵ *Armitage v. A.-G.*, [1906] P. 135, criticized by J. H. C. Morris, 24 *Canadian Bar Review*, 73; replied to 25 *Canadian Bar Review*, 226 et seqq. (Raphael Tuck).

⁶ *Perin v. Perin*, [1950] S.L.T. 51; *McKay v. Walls*, [1951] S.L.T. (Notes of Recent Decisions) 6 (Scotland).

⁷ [1906] P. 135.

Divorce could not have been obtained in New York for desertion, but it was proved in evidence that the law of New York would recognize the validity of a decree granted in another State in such circumstances as the above.

Sir Gorell Barnes held that the decree was equally binding in England. All questions of status are subject to the *lex domicilii*, and here was a decree, recognized by that *lex*, which patently affected the status of husband and wife.¹ The restricted interpretation of this decision by *Mountbatten v. Mountbatten* is discussed later.²

Not only does English law recognize a decree of divorce granted by the courts of the foreign domicile of the parties, but it also recognizes that, even in the case of a marriage contracted in England between British subjects, the decree is governed exclusively by the law of that domicile.³ Thus the validity of a divorce obtained in the country of domicile is not affected by the fact that it was granted for some cause, such as insulting behaviour⁴ or violent and ungovernable temper,⁵ which is inadequate by English law. Speaking of this principle in *Bater v. Bater*,⁶ Sir Gorell Barnes said:

Validity of
divorce
exclusively
governed
by *lex*
domicilii

'It is based upon the simple proposition that if this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country, even though that law would dissolve a marriage for a lesser cause than would dissolve it in this country. Absurd results would follow if that were not so, because by the law of the domicile they would cease to be husband and wife, and yet if they returned to this country they would be husband and wife. That is not convenient, nor is it logic, and I think if they were bona fide and properly domiciled in the country where it takes place it is a good divorce.'

Although a decree of divorce given in the common domicile of the parties is, of course, an effective termination of their status as husband and wife, it does not automatically terminate a maintenance order in favour of the wife made by an English court at a time when the parties were domiciled in this country. It lies within the discretion of the English court either to discharge or to vary it, and in exercising this

¹ This is also true of a nullity decree; *Abate v. Abate*, [1961] 2 W.L.R. 221. [1959] P. 43; *infra*, pp. 399-400.

² *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Bater v. Bater*, [1906] P. 209. ⁴ *Metzger v. Metzger*, [1937] P. 19.

⁵ *Pemberton v. Hughes*, *supra*.

⁶ [1906] P. 209, at p. 217.

discretion it is relevant to consider whether the wife participated in the divorce proceedings, whether the question of maintenance was raised before the foreign court and whether the ground for divorce was insufficient by English law.¹

Recognition of certain divorces granted in country of residence
 An exception to the rule that divorce jurisdiction is confined to the courts of the domicile has been created by the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, as amended by the Colonial and Other Territories Divorce Jurisdiction Act, 1950.

The Acts of 1926 and 1940 provide that the Indian High Court shall have divorce jurisdiction in respect of British subjects domiciled in England or Scotland if the petitioner was resident in India at the time of presenting the petition and if the place where the parties last resided together was in India.² The grounds on which divorce may be granted are limited to those recognized by the existing law of England.³

The Acts next provide that any such divorce shall be registrable in the country of the domicile of the parties and that after registration proceedings may be taken thereunder as if the decree had been made by the High Court in England or the Court of Session in Scotland.⁴

It is also enacted that these statutory provisions may be extended by Order in Council to any part of His Majesty's dominions, other than self-governing dominions,⁵ and that such order may determine the court by which the divorce jurisdiction is to be exercised.⁶ Between 1928 and 1937 the provisions were extended to Kenya,⁷ Singapore and the Malayan Union,⁸ Jamaica,⁹ Ceylon,¹⁰ Hong Kong,¹¹ and Burma.¹² The Acts ceased to apply to India, Pakistan, Burma, and Ceylon when these countries gained their independence, but the other extensions remain effective.

The Acts have been further strengthened in two respects by the legislation of 1950.¹³

¹ *Wood v. Wood*, [1957], P. 254; 33 *B.Y.B.I.L.* 336 (P. B. Carter).

² Indian and Colonial Divorce Jurisdiction Act, 1926, s. 1 (1), as amended by Indian and Colonial Divorce Jurisdiction Act, 1940, s. 2 (1).

³ Act of 1926, s. 1 (1) (a) as amended by Act of 1940, s. 1 (1).

⁴ Act of 1926, s. 1 (3) as amended by Act of 1940, s. 4 (2).

⁵ i.e. they may not be extended to Canada, Australia, New Zealand, South Africa, Eire, Newfoundland, and Southern Rhodesia.

⁶ Act of 1926, s. 2.

⁸ S.R. & O. 1931, Nos. 851, 1103.

¹⁰ S.R. & O. 1936, No. 562.

¹² S.R. & O. 1937, No. 230.

⁷ S.R. & O. 1928, No. 635.

⁹ S.R. & O. 1932, Nos. 475, 646.

¹¹ S.R. & O. 1935, No. 836.

¹³ 4 *I.L.Q.*, 247-9.

First, they have been made applicable to persons domiciled in Northern Ireland.¹

Secondly, Orders in Council may now be made extending the provisions to protectorates, trust territories² and protected States,³ expressions which are to have the meanings assigned to them by the British Nationality Act, 1948.

The common law doctrine, which repudiates any foreign decree of divorce not based jurisdictionally upon domicile, was established at a time when domicile was the only ground upon which the English court itself assumed jurisdiction. Since 1937, however, the domestic jurisdiction has been widened in the case of petitions by a wife and may now be founded upon her prior but no longer existing English domicile,⁴ or upon her residence in England during the last three years.⁵ The question, therefore, is whether the common law doctrine ought not to be modified so as to permit recognition of a foreign decree based jurisdictionally upon some non-domiciliary ground, provided that the ground is substantially similar to that upon which English jurisdiction may be founded. If limping marriages are to be avoided, i.e. marriages regarded as valid in one country but void in another, and if the uniformity of private international law is to be advanced, there is everything to commend this principle of reciprocal recognition.

Decrees not based on domicile exceptionally recognized

Since English legislation has encroached upon the judge-made doctrine of domicile established by *Le Mesurier v. Le Mesurier*, there is no reason why the similar encroachments of foreign legislatures should be ignored, for if the common law is not to stagnate, what has been decided by the judges in the past must be expanded to meet the changing conditions of life.

The first step in applying the principle was taken by the Court of Appeal in 1953 in *Travers v. Holley*⁶ on the following facts:

Foreign jurisdiction recognized if similar to Matrimonial Causes Act, 1950, s. 18 (1) (a)

A husband and wife, domiciled in England, emigrated to Australia and, as the majority of the court held, acquired a domicile in New South Wales. The husband, however, had reverted to his English domicile at the time when his wife petitioned the court in New South Wales for a decree of divorce on the ground of his desertion. The decree was granted. The court assumed jurisdiction under a local statute couched

¹ Colonial and Other Territories (Divorce Jurisdiction) Act, 1950, s. 1.

² *Ibid.*, s. 2 (1).

³ *Ibid.*, s. 3.

⁴ Matrimonial Causes Act, 1937, s. 13, now contained in the Act of 1950, s. 18 (1) (a); *supra*, p. 388.

⁵ *Ibid.*, s. 18 (1) (b); *supra*, p. 388.

⁶ [1953], P. 246.

(1953)

in terms similar to those now contained in section 18 (1) (a) of the English Matrimonial Causes Act, 1950.¹

The Court of Appeal held that this decree, though not given by the court of the common domicile of the parties at the time of the proceedings, must be recognized as valid. In the words of Hodson L.J.:

'It must surely be that what entitles an English court to assume jurisdiction, must be equally effective in the case of a foreign court. . . . I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves.'²

The principle thus established was applied by Barnard J. in *Carr v. Carr*³ where the Northern Irish court had exercised jurisdiction under a statute again equivalent to section 18 (1) (a) of the English Act.

Foreign jurisdiction similar to s. 18 (1) (b) of the English Statute Since these decisions, the courts have not lost the opportunity to apply the same principle to cases where the foreign jurisdiction has been assumed on ground substantially similar to the three years' ordinary residence of the wife which suffices under section 18 (1) (b) of the Matrimonial Causes Act.⁴

Modern basis of reciprocity principle A further and far-reaching development is that reciprocal treatment is no longer confined to cases where there is substantial similarity between the English and foreign jurisdictional rules. This development was initiated by Karminski J. in *Robinson-Scott v. Robinson-Scott*,⁵ where he held that a foreign decree will be recognized even though the jurisdictional ground upon which it was based is not an exact replica of section 18. The ground may have been, for instance, that the parties had last lived together in the foreign forum⁶ or that the wife had acquired a separate domicile there,⁷ yet, if in fact the wife has ordinarily resided there for a period of three years immediately prior to the proceedings, the decree will be recognized, since the English court itself would have exercised jurisdiction on proof of such a residence.

¹ *Supra*, p. 388.

² [1953] P. 246, at pp. 81-82.

³ [1955] 1 W.L.R. 422.

⁴ See the authorities in notes 6 and 7 *infra*.

⁵ [1958] P. 71. 35 B.Y.B.I.L. p. 265. (P. B. Carter); 7 I. & C.L.Q. 166 (R.H.G.).

⁶ *Arnold v. Arnold*, [1957] P. 237; *Manning v. Manning*, [1958] P. 112; *Gerrard v. Gerrard*, *The Times*, 18 Nov. 1958; *Matchett v. Matchett*, *The Times*, 16 Dec. 1958.

⁷ *Robinson-Scott v. Robinson-Scott*, [1958] P. 71.

'It is not essential for recognition by the court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction.'¹

Thus, 'it is the facts of the case, not the content of the jurisdictional rule, which must be investigated'.² It may now be taken as settled that a foreign decree will be recognized where the facts, if reversed, disclose a situation in which the English court would have possessed jurisdiction.³

In effect, this means that the original conception of substantial similarity has been discarded in favour of merely ascertaining whether in the actual circumstances of the case the English court would have assumed jurisdiction had the facts been reversed. It is, therefore, no longer necessary to discuss the reasoning upon which Davies J. based his decision in *Dunne v. Saban*.⁴ In view of the new slant given to the doctrine of reciprocity, the same decision would be reached now, though presumably on a different ground.

As regards choice of law, these decisions show that if the residential qualification is in fact satisfied it is immaterial that the wife obtained the foreign divorce for a reason not recognized by the English law of her domicile. This ruling contains the seeds of injustice.⁵ It puts the wife in a more favourable position than the husband by enabling the wife to reside for three years in a foreign country and then to obtain a divorce that would not be possible under English law. Perhaps, however, this is inevitable, for, as we have seen, the exercise by the English court of its jurisdiction under section 18 of the Act may produce the same unfortunate result.⁶

In *Mountbatten v. Mountbatten*⁷ the possibility of reciprocal recognition was considered in connexion with the doctrine of *Armitage v. Attorney-General*.⁸

The husband, domiciled in England, married his wife in 1950 and lived with her in New York City until December 1952, when he returned to England. The wife refused to accompany him and in 1954 she

Ground of
foreign
divorce
immaterial
to
reciprocal
recognition

Reciprocity
principle
not
extended to
rule in
Armitage
v. A.-G.

¹ *Ibid.*, at p. 88.

² 35 *B.Y.B.I.L.* p. 266 (P. B. Carter).

³ *Manning v. Manning*, *supra*.

⁴ [1955] P. 178. For a discussion of this case, see 31 *B.Y.B.I.L.* 472-4 (J. M. Sinclair); 35 *B.Y.B.I.L.* 366; 4 *I. & C.L.Q.*, 389 (Gilbert M. Kennedy).

⁵ 35 *B.Y.B.I.L.* 268-9.

⁶ *Supra*, pp. 389-90.

⁷ [1959] P. 43; 35 *B.Y.B.I.L.* 269-72 (P. B. Carter); 8 *I. & C.L.Q.* 404-12.

⁸ [1906] P. 135; *supra*, p. 394.

obtained a divorce in Mexico for incompatibility of temper, the jurisdictional grounds being that she was resident in Mexico and that both parties had submitted to the jurisdiction. The expert evidence showed that this decree would be recognized without question in the State of New York. The wife was ordinarily resident in New York from 1950 until 1958 when the husband petitioned the English Court for a declaration that the Mexican decree was effective in the eyes of English law.

The husband relied upon the principle of reciprocity and very briefly his argument may be summarized as follows: in the *Armitage Case* in 1906 the South Dakotan decree was recognized because it was recognized in New York where the parties were domiciled. According to English private international law in 1906, domicile was the only determinant of jurisdiction and choice of law in the matter of divorce. Since then, however, two modifications of this doctrine have occurred in England. First, statutory jurisdiction has been given to the High Court to entertain a wife's petition if she has resided in England for the last three years.¹ Secondly, it has now been judicially decided that a decree obtained by a wife in, say, New York on the sole jurisdictional ground of residence there for the last three years is effective in the eyes of English law. Thus, since residence has been equated with domicile for jurisdictional purposes, should there not be a similar equation as regards the *Armitage* doctrine? More precisely, if a divorce *granted* in New York on the basis of three years' residence is effective in the eyes of English law, should not a divorce granted in a third country but *recognized* as valid by New York law be regarded by English law as equally effective?

For better or for worse, however, the learned judge, Davies J., was not prepared to go so far. He took the view that domicile is still the paramount factor in considering the international validity of divorce, and that the statutory exception introduced by statute must be restrictively construed. Thus one attempt to reduce the number of limping marriages has failed.

Is an extra-
judicial
foreign
divorce
recognized?

The next question is whether the method by which a foreign divorce has been obtained is material to its recognition by English law. Is it, for instance, to be disregarded if it has not been granted by a court of law? This is an important problem, for the doctrine familiar to English law that divorce requires a judicial process is not universally accepted.

¹ Matrimonial Causes Act, 1950, s. 18 (1) (b); *supra*, p. 388.

For instance, in China, a written statement in the proper form by which two spouses agree to divorce each other operates *ipso facto* as a dissolution of their marriage, though it may be registered if the parties so desire.

In Japan a divorce is obtainable as of right by mutual consent, the only formality being that the consent should be notified to a registrar.

A similar system prevailed in Russia prior to 1944.¹

It is submitted that a divorce obtained in, or according to the law of, a foreign domicile, even though obtained without contentious proceedings and even though it dissolves a marriage solemnized in England between British subjects, must be recognized by the courts of England, since it satisfies the general principle that alterations of status are governed by the *lex domicilii*. A fundamental principle, once it has deliberately been adopted, should be applied fearlessly, and, in the absence of some peremptory consideration of public policy, should not be frittered away by exceptions merely because the views of the *lex domicilii* on the institution of marriage are less stringent than those held in England. Public policy can scarcely be invoked in the present connexion. Marriage is a universal institution. It creates a status that according to English principles is governed by the law of the domicile. It is that law which decides *inter alia* whether the status shall cease, and it is difficult to agree that its termination by some process adequate according to the personal law should be disregarded merely because it has been effected in a manner alien to English conceptions and practice. English law does not disregard a form of legitimation

Is such a
divorce
valid in
England?

¹ Under the Soviet law of 1918 a marriage was dissoluble by mutual consent, the only requirement being that an official should register the divorce. Failing mutual consent, one party was entitled as of right to a divorce from the court, provided only that proper notice had been given to the other party.

Under the Soviet code of 1926, divorce, as well as marriage, was a question of fact. Persons who lived together as man and wife were married in fact and in law; if they separated, either by mutual consent or at the will of one, they were divorced. The registration that was necessary did not effect divorce but merely provided conclusive evidence of the discontinuance of the marriage.

The Prohibition of Abortions Act, 1936, passed 'with a view to combating a frivolous attitude towards the family', required the parties to appear in person before the registrar. The pendulum swung back somewhat violently on 8 July 1944, when a decree modifying the marriage laws was promulgated. Article 23 of this provides that divorce must take place in the public courts. Notice of a desire to dissolve the marriage must first be presented to the People's Court, before which both parties must appear (Art. 24). This court must attempt to reconcile the parties, but if it fails the claimant is entitled to apply for dissolution to a higher court (Art. 25). For a full account of the present Russian practice see 11 *M.L.R.* 163 et seqq.

allowed in the domicile merely because it is not a possible form in England. If the *cause* for divorce is immaterial to its recognition in England, as the authorities indubitably establish, why should its *method*, judicial or extra-judicial, be material? The question is not—By what procedure has the marriage been dissolved? It is—Has the marriage been dissolved according to the law of the domicile? The *lex domicilii* must either be accepted *in toto* or altogether repudiated. There is no halfway house.¹

1917. The *Hammer-smith Marriage Case*² requires consideration in the light of these remarks.

A Mohammedan, domiciled in India, married a domiciled English-woman in England with English formalities. He later sent her a written declaration of divorcement, called *talaknama*, by which he purported to dissolve the marriage. By Mohammedan law a Mohammedan may have four wives at the same time, and may dissolve any of his marriages by a mere declaration of his will and without seeking the intervention of a court of law. Indeed, access to a court is denied to him, for the Indian courts have no jurisdiction to dissolve his marriage, and his Indian domicile prevents him from resorting to the English courts.

Two grounds for the decision. The question before the King's Bench Division, and later before the Court of Appeal, was whether the *talaknama* was effective in England to dissolve the marriage. The six judges unanimously held that it was not. This repudiation of the *lex domicilii* would appear to have been based on two main reasons.

(i) No judicial decree. The first was that English law will not recognize a foreign divorce unless it has been decreed by a court of law.

Lord Reading, for instance, said that neither authority nor principle could be found for the proposition that a marriage contracted in England could be dissolved in the eyes of English law by mere operation of the religious law of the husband and without a decree of a court of law.³

Swinfen Eady L.J., adopting the opinion of Lord Brougham, stigmatized as absurd the suggestion that 'if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every other country ought to sanction a separation had *in pais* there, and uphold a second marriage contracted after such a separation'.⁴

¹ See Wolff, s. 347.

² *R. v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634.

³ *Ibid.*, at pp. 642-3.

⁴ *Warrender v. Warrender* (1835), 2 Cl. & F. 488, at p. 532.

It is submitted that the proposition, so disparagingly rejected, is perfectly sound in principle. The *lex domicilii* applicable to the husband was the law of his religion, and whether that law required a judicial decree or not was no concern of the English court. The insistence upon a judicial proceeding scarcely harmonizes with the attitude consistently adopted by the Privy Council towards Jewish divorces. In Egypt and in certain countries in the Levant, Jews are subject to the law of their religion upon matters of personal status such as marriage and divorce. Jewish Rabbinical law permits a husband to divorce his wife by the delivery of a *gett* (i.e. a letter of divorce), and, though this requires his appearance before a Rabbi, the proceeding is formal and in no way dependent upon a judicial pronouncement. Nevertheless, it was held by the Privy Council in *Sasson v. Sasson*¹ that an extra-judicial divorce of this nature obtained in Alexandria must be recognized as dissolving the marriage of two British subjects domiciled in Egypt. This decision, though given on appeal from a court in Egypt and concerned with the interpretation of an Order in Council,² shows that it has not been the policy of English law to disregard a divorce binding in the domicile merely because it has been granted without judicial investigation.

Moreover, it may be asked why such stress should be laid on the fact of judicial proceedings. Judicial intervention has no inherent virtue, neither is it universal. The only method by which a marriage can be dissolved at the present day in Quebec is an Act of Parliament, and it is inconceivable that a divorce obtained in this province should be disregarded in England.

✓ The second reason for disregarding the *lex domicilii* in the *Hammer-smith Case* was that the marriage was not a marriage in the Mohammedan sense at all and therefore that it could not be dissolved in the Mohammedan manner.³ (ii) Method unsuitable for monogamous marriage

This is a more intelligible reason. So long as the traditional view endures that the *lex loci celebrationis* determines the character of a marriage,⁴ a marriage in England must of necessity be monogamous, and it is clear therefore that the court could no more recognize a divorce by a non-monogamous method than it could permit the husband to contract further valid marriages in England. A Christian marriage cannot be dissolved by a Mohammedan divorce, a fact with which presumably Moslem law

¹ [1924] 1 A.C. 1007.

³ *Ibid.*, at p. 659.

² *Bell Yard* (Nov. 1935), 10-11.

⁴ *Supra*, pp. 309 et seqq.

would agree. There appear to be two views that Mohammedan law might take of the English ceremony. It might regard the marriage as a nullity, in which case an English court ought on principle to accept this conclusion of the *lex domicilii*. Or it might regard the marriage as good in the Christian, though not in the Mohammedan, sense, and therefore not open to a Mohammedan method of divorce. On this latter hypothesis the decision is reconcilable with the principle that the *lex domicilii* must be followed upon questions of status. A Japanese divorce stands upon an entirely different footing, for, though it is obtainable without judicial intervention, it is designed for monogamous marriages. In view of the litigation about to be considered, it may now be taken that the decision in the Hammersmith Marriage Case must rest only on the second ground assigned by the court.¹

1953. The Har-Shefi cases. It is now settled by the Har-Shefi² litigation, however, that an extra-judicial divorce, obtained in accordance with the religious law of the common domicil of the parties, must be recognized as valid. This litigation was provoked by the following facts:

Facts: In 1950, a marriage was contracted in Israel between two members of the Jewish faith. The husband was continuously domiciled in Israel, the wife was domiciled in England before the marriage. After a short residence together in England during 1951, the husband was deported from the country, but his wife did not accompany him. Before his departure, he delivered a *gett* which was received by his wife at the Beth Din in London, the court of the Chief Rabbi.

In *Har-Shefi v. Har-Shefi* (No. 1)³ the wife petitioned for a declaration that her marriage had been validly dissolved as from the date of receipt of the *gett*. The Court of Appeal held in the first place that the Divorce Court possesses jurisdiction to pronounce such a declaratory judgment, even though no other matrimonial relief is sought. This jurisdiction, however, is exercisable only if the petitioner is domiciled in England. The second question in the instant case, therefore, was whether Mrs. Har-Shefi had reverted to her English domicil of origin.

¹ See also *Maier v. Maier*, [1951] 2 All E.R. 37; *Bialik v. Bialik*, 3 I.L.Q. 365, where by a Palestinian decision given in terms of English law a divorce by mutual consent of members of the Jewish faith domiciled in Palestine was held to be valid.

² *Har-Shefi v. Har-Shefi* (No. 1), [1953] P. 161; (No. 2), [1953] P. 220. See also *El-Riyami v. El-Riyami*, *The Times*, 1 April 1958; *Yousef v. Yousef*, *The Times*, 1 August 1957.

³ *Supra*.

This depended upon the legal effectiveness of the delivery of the *gett*, and this in turn depended upon whether Israeli law, the law of her domicil throughout the marriage, would recognize that a valid divorce had been effected. The Divorce Court must therefore hear evidence on this matter and decide for itself whether the divorce was valid by that law or not.

Acting upon that ruling, the wife, in *Har-Shefi v. Har-Shefi* (No. 2),¹ petitioned the Divorce Court for a declaration that her marriage had been dissolved. Pearce J. was satisfied by the expert evidence that Israeli law would treat the delivery of the *gett* as a valid divorce. Accordingly, citing *Sasson v. Sasson*² as persuasive authority, he held that the marriage had been 'validly dissolved by the only form of divorce open to a Jew domiciled in Israel'³ and made a declaration to that effect. Had the parties been domiciled in England the delivery of the *gett* would have had no effect upon the status of the parties.⁴

The salient features of this litigation were that no judicial process had been put in motion in the Israeli domicil and that what was held to constitute a divorce was an act performed wholly in England. The decisions in fact exemplify a shift of emphasis from jurisdiction to choice of law. The question upon which the issue was made to turn was not whether a valid divorce had been obtained in the country of the domicil, but whether it had been obtained according to the law of the domicil.⁵

A decree of divorce granted by the court of the domicil, since it regulates the status of the parties, constitutes a judgment *in rem* that is binding throughout the world,⁶ provided that it satisfies the requirements of finality and conclusiveness that are necessary to make foreign judgments effective in England. We shall see later that a foreign judgment is not actionable in England unless it finally and conclusively determines the issue between the parties.⁷ The question whether a decree of divorce is of this nature may arise where the decree, though purporting to dissolve the marriage, has restrained one or both of the parties from remarrying. Restrictions of this kind are common in the legal systems of the modern world, and they appear to fall roughly into two classes, namely, those which

Effect of
prohibi-
tions
against re-
marriage

¹ [1953] P. 220.

² *Supra*, p. 403.

³ At pp. 223-4.

⁴ *Preger v. Preger* (1926), 42 T.L.R. 281; *Joseph v. Joseph*, [1953] 1 W.L.R. 1182.

⁵ 17 M.L.R. 501 (R. H. Graveson).

⁶ *Baier v. Baier*, [1906] P. 209.

⁷ *Infra*, pp. 658-60.

are directed against the guilty party and those which postpone the date at which either party may contract a further marriage.¹

(i) Re-marriage of either party within specified period

To take the latter class first, it may be said that a decree which forbids the parties to remarry before a certain period has elapsed has not finally and conclusively restored the parties to the status of celibacy. It is somewhat analogous to the order *nisi* that is conspicuous in the English practice. The dissolution of the marriage occurs upon the lapse of the specified period, not at the issue of the decree. This view was adopted for English law in *Warter v. Warter*,² where the parties, who had been divorced in Calcutta, were prohibited by the Indian law of their domicile from marrying again before six months. It was held that a marriage contracted by the wife within six months with a domiciled Englishman was invalid.

(ii) Re-marriage of guilty party

On the other hand, a decree which finally dissolves the marriage, but which, by way presumably of punishment, imposes a restriction on the guilty party, is regarded by English law as imposing a penalty. We have already seen that the penal laws of foreign countries may be disregarded in England.³

Thus in *Scott v. A.-G.*:⁴

Two persons domiciled in South Africa were divorced in that country, and thereupon became subject to a rule of South African law which provided that the guilty party could not remarry as long as the other party remained unmarried. The wife, who was the guilty party, remarried in England, her former husband being still unmarried.

This second marriage was upheld by the English court on the ground that the restriction on remarriage was a penalty, and therefore inoperative out of the jurisdiction under which it was inflicted. The correctness of this decision would seem, indeed, to rest on an even simpler reason. Since the decree had effected a complete dissolution of the marriage according to South African law, the woman, being no longer a wife, was free to acquire her own separate domicile. She had in fact acquired a new domicile in England at the time of her remarriage, and therefore there was no possible ground upon which her capacity to marry could be referred to South African law.⁵

¹ On this subject see 42 *Transactions of the Grotius Society*, pp. 138-41 (Michael Mann).

² (1890), 15 P.D. 152; but see now *Buckle v. Buckle*, [1956] P. 181. *Boettcher v. Boettcher*, [1949] W.N. 83; 93 Sol. J. 237. See the Australian case, *Miller v. Teal* (1955), 29 A.L.J. 91; discussed 5 *I. & C.L.Q.* 137-41.

³ *Supra*, pp. 138 et seqq.

⁴ (1886), 11 P.D. 128.

⁵ See Wolff, p. 379; 21 *Australian Law Journal*, 4.

A foreign decree of divorce or of nullity that is ineffective because made by a court lacking jurisdiction is ineffective in all its aspects. Not only is the decree *in rem*, dissolving or annulling the marriage, disregarded in England, but also any consequential decree *in personam*, such as an order for alimony.¹ In the words of Goddard L.J.:

A foreign decree of divorce, if void, is void *in toto*

'If the main order goes, then any order which is merely ancillary to that order should go with it.'²

This was one of the points decided in the somewhat complicated case of *Papadopoulos v. Papadopoulos*,³ where the facts were as follows: 1930 case

A domiciled Cypriot, belonging to the Greek Orthodox Church, married a Frenchwoman at a registry office in London, according to the English formalities. Some eight years later a Cypriot court annulled the marriage by consent of the parties on the ground that it had not been celebrated in a church or by a priest of the Greek Orthodox religion as is required by the law of Cyprus in the case of a party professing that faith. The court also decreed that the husband should pay the wife a lump sum of £380 in satisfaction of all claims including maintenance. The court, which was a British court established and regulated by an Order in Council, had in fact no jurisdiction either to annul or to dissolve a marriage. Fifteen years later the wife instituted summary proceedings against the husband in London, where he was then resident, and obtained an order for maintenance at the rate of £2 a week. The present case was an appeal from that order.

It was incontrovertible that the marriage in London was valid, since the English formalities had been observed. Nevertheless it was argued that the English order for the payment of maintenance was wrong in law, on the ground that the parties had lost the status of husband and wife by virtue of the Cypriot judgment, and also on the ground that the receipt by the wife of £380 under the Cypriot order nullified her claim to maintenance. Further, the Cypriot judgment was said to be severable. The decree *in rem* annulling the marriage was ineffective, the decree *in personam* ordering a fixed payment in lieu of maintenance was conclusive. These arguments had no substance.

First, the Cypriot court, according to its constitution, could award neither maintenance nor a lump sum in lieu thereof unless it first made a decree of nullity, of divorce, of restitution of

¹ *Simons v. Simons*, [1939] 1 K.B. 490; *Papadopoulos v. Papadopoulos*, [1930] P. 55.

² *Simons v. Simons*, *supra*, at p. 499.

³ *Supra*.

conjugal rights or of judicial separation. By its constitution it had no jurisdiction to annul or to dissolve the marriage, and it had not purported to make a decree either of restitution or of judicial separation. The Cypriot decree was void *in toto*.

Secondly, the want of jurisdiction to annul the marriage was not curable by the submission of the parties.

'Consent makes no difference; the husband and wife could not by consent give the court jurisdiction to declare that the woman was not a wife, or to make an order upon that footing.'¹

It was held, therefore, that the parties were still husband and wife and that the English order for maintenance could not be impugned.

(C) SUITS FOR JUDICIAL SEPARATION

English grounds upon which decree granted Judicial separation, the equivalent of the divorce *a mensa et thoro* formerly granted by the ecclesiastical courts, is a remedy seldom sought in England,² a fact which perhaps explains why, in the field of private international law, the relevant authorities are sporadic and a little confused. The remedy may be granted by the High Court to either party upon any grounds upon which a decree of divorce may be granted,³ or for failure to comply with a decree of restitution of conjugal rights or upon any grounds for which a decree of divorce *a mensa et thoro* might have been granted by the ecclesiastical courts before 1857,⁴ namely, the commission of an unnatural offence.

Effect of a decree of judicial separation A decree of judicial separation entitles the petitioner to live apart from the respondent, but does not dissolve the marriage. It is permanent in the sense that it remains in operation and enforces celibacy upon both parties unless the successful petitioner takes steps to terminate it. Thus it is an alternative remedy to divorce and, though more often than not it is chosen by those who on religious or conscientious grounds feel that a marriage should be indissoluble, its choice may be instigated by a vindictive desire to keep the respondent tied for life despite a genuine offer by him or her to resume married life.⁵

¹ [1930] P. 55, at p. 69, *per* Hill J.

² In 1954, for instance, 74 decrees were granted though there were 27,353 divorce decrees; Royal Commission on Marriage and Divorce, 1951-5; Cmd. 9678, p. 88, note 2.

³ *Supra*, p. 383, note 4.

⁴ Matrimonial Causes Act, 1950, s. 14 (1).

⁵ Cmd. 9678, para. 304, p. 88.

The enforced celibacy of the parties has a significant bearing upon the true nature of judicial separation from the point of view of private international law. The problem is whether the decree affects the status of the parties or whether, in the interests of internal order and social decency, it merely protects the petitioner from some of the consequences of that status. The answer is important, at any rate on principle, for, both as regards jurisdiction and choice of law, the predominant factor should be the domicil of the parties if their status is affected, otherwise it should be their place of residence.

Does
judicial
separation
affect
status?

A common judicial view, and the one accepted in the previous editions of this book, is that the status of the parties remains unchanged.¹ The decree is said to have a merely transient and limited effect upon the unity in law of husband and wife, and the Privy Council once expressed the opinion that even sections 25 and 26 of the Act of 1857, which provided that a wife after judicial separation should be considered a *feme sole* for the purpose of acquiring property, making contracts and bringing actions, merely suspended certain obligations of matrimony.

View that
status
unaffected

'Upon a reconciliation, the wife, rescinding the suspension, returns home as a wife; upon a departure from the obligation of sexual continence, she may as a wife be divorced *a vinculo*.'²

Another reason sometimes advanced for the same view is that the object of judicial separation is to protect the one party against the other so long as they remain within the jurisdiction of the court,³ but this fails to distinguish a decree of judicial separation granted by the High Court from the essentially different separation order made by a court of summary jurisdiction.⁴ The former is a general matrimonial remedy alternative to divorce, while the object of the latter is to afford immediate protection to an injured spouse.⁵

The directly opposite view has been taken by other judges. Thus, Brett L.J. in his dissenting judgment in *Niboyet v. Niboyet*,⁶ which was later vindicated as regards divorce, claimed

Preferable
view that
status is
affected

¹ See e.g., *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, 527; *Anghinelli v. Anghinelli*, [1918] P. 247.

² *A.-G. for Alberta v. Cook*, [1926] A.C. 444, 464.

³ *Armytage v. Armytage*, [1898] P. 178, 195.

⁴ Under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1947.

⁵ Royal Commission on Marriage and Divorce, Cmd. para. 1037; 42 *Transactions of the Grotius Society*, 35-36.

⁶ 4 P.D.1, at p. 12.

that as matter of principle the only law entitled to affect 'an alteration in the relation between husband and wife'—an alteration which certainly results from a decree of judicial separation—is the law of the country to which the parties belong by nationality or domicile. Further, in *Eustace v. Eustace*,¹ the Court of Appeal, in holding that domicile is a sufficient basis of jurisdiction, appears to have recognized that the status of parties judicially separated is materially affected. Atkin L.J. said:

'The reason which leads me to hold that domicile gives jurisdiction in suits for judicial separation is that, in my view, the provisions of sections 25 an d26 of the Matrimonial Causes Act, 1857, affect the status of the spouses after decree.'²

In a later case, Sachs J. stigmatized the denial that their status remains unaffected as savouring somewhat of 'a blend of dogma and absence of precedent'.³

The importance of acknowledging the truth of this view lies in the fact that English private international law on the subject can scarcely work in a vacuum, but must take account of foreign legal systems. In France, for instance, *séparation de corps* may be converted into divorce after three years at the instance of either party, and both remedies are subject to the same principles of private international law. In neither case will a decree be granted to foreigners unless the parties have a French domicile. In many countries judicial separation is unknown; in others it is the only remedy except annulment and is therefore necessarily regarded as effecting a modification of status.⁴ In fact, it is difficult to disagree with the following passage from a learned paper on the subject by Mr. J. K. Grodecki:⁵

'Whilst, however, technically the spouses remain married, it is idle to pretend that their status has not been profoundly affected by the decree. The most important conjugal obligation, that of cohabitation, disappears and there are other far-reaching consequences which vary from country to country. No one can doubt that a decree of judicial separation is regarded as modifying status in countries which still do not admit divorce, but the same is true of France and other states which know both remedies. The matter seems largely one of definition. The term 'status' is not precise, and it does not seem unreasonable to describe the position of persons judicially separated as a status half-way between the status of marriage and that of celibacy.'

¹ [1924] P. 45.

³ *Tursi v. Tursi*, [1957] P. 54 at p. 62.

⁴ 42 *Transactions of the Grotius Society*, 24, 38.

² *Ibid.*, at p. 54.

⁵ *Ibid.*, p. 36.

English private international law, however, is at present indecisive on the matter and this is reflected in the authorities that have considered the two questions of jurisdiction and choice of law.

Present
state of
English law

(a) *English Suits*

Jurisdiction. Since judicial separation is the equivalent of the ecclesiastical remedy of divorce *a mensa et thoro* and since the civil court set up by the Act of 1857 was enjoined by section 22 to apply as nearly as possible the ecclesiastical rules and principles, it is scarcely surprising that the judges, in view of their inveterate tendency to sanctify the residential test of the bishop's jurisdiction, adapted it to a case containing a foreign element.¹ It is clearly established that the High Court has jurisdiction if at the time of the proceedings the respondent is resident in England,² even though the petitioner continues to reside in another country.³ It is not essential that the respondent's residence should be in any sense permanent or that he should have a matrimonial home in England, but something more than his casual presence there is required.⁴ If, in fact, he maintains a matrimonial home, then the residential qualification is satisfied, although he may be abroad in the pursuit of his calling at the time of the petition, as may well happen, for instance, in the case of a seaman or man of business.⁵ It is not enough that the petitioner alone resides here.⁶ It is not necessary that the conduct of the respondent which is the occasion of the petition should have occurred in England.⁷

Residence
as a basis
of English
jurisdiction

In *Eustace v. Eustace*⁸ the husband respondent resided in Scotland, the petitioner in England, but the Court of Appeal held that the English domicile of the parties sufficed to give the court jurisdiction. The Lords Justices dismissed as an 'impossible contention' the argument that the rule rendering an ecclesiastical tribunal incompetent unless the respondent resided within the diocese applied equally to the civil court established by the Act of 1857.

Domicil in
England as
a basis of
jurisdiction

¹ But see *supra*, p. 361.

² *Armytage v. Armytage*, [1898] P. 178. *Anghinelli v. Anghinelli*, [1918] P. 247.

³ *Sim v. Sim*, [1944] P. 87.

⁴ *Matalon v. Matalon*, [1952] P. 233.

⁵ *Raeburn v. Raeburn* (1928), 44 T.L.R. 384, 386; *Ward v. Ward* (1923), 39 T.L.R. 440.

⁶ *Graham v. Graham*, [1923] P. 31. *Riera v. Riera* (1914), 112 L.T. 223, to the opposite effect is plainly wrong.

⁷ *Armytage v. Armytage*, *supra*, at p. 194.

⁸ [1924] P. 45.

Statutory
jurisdiction
where wife
deserted

Another case in which domicile plays its part is where the parties are domiciled in England immediately before the husband deserts his wife or is deported from the country. In these circumstances, section 18 (1) (a) of the Matrimonial Causes Act, 1950, gives the court jurisdiction to entertain a petition by the wife for judicial separation, notwithstanding that at the time of the proceedings the husband is resident and domiciled abroad.¹

Practice of
the courts
is to apply
the *lex fori*

Choice of law. Having once assumed jurisdiction, the courts have consistently applied English domestic law in reaching their decision. There is no objection to this where the object of the suit is to afford immediate protection to an injured spouse, as in the case of a magisterial separation order or a decree of judicial separation founded upon cruelty, but in other cases, once it can be admitted that the decree affects the status of the parties, it is inadmissible in principle to apply the *lex fori* as such if they are domiciled abroad. If, for instance, they are Austrian by nationality and domicil though resident in England, the court no doubt is competent to decree their judicial separation, but, since this matrimonial remedy is unknown in Austria, the courts of that country can scarcely be expected to recognize the validity of the decree.² Where, however, jurisdiction is exercised by virtue of section 18 (1) (a) of the Act, the court is statutorily required to apply the domestic law of England.³

(b) *Foreign Suits*

Reciprocity
should
govern
foreign
jurisdiction

Having regard to the doctrine of *Travers v. Holley*, it is difficult to escape the conclusion that, as in the case of divorce, the principles upon which English courts assume jurisdiction should be reciprocally applied. Therefore, a foreign decree of judicial separation should be recognized if based upon a jurisdictional ground which *mutatis mutandis* is a sufficient ground in England. Upon this footing, the tests of jurisdiction are three—the domicile of the parties in the foreign forum, the residence of the respondent in that forum and finally the occurrence of circumstances equivalent to those set out in section 18 (1) (a) of the Matrimonial Causes Act, 1950. There is English authority for the first of these conclusions.

¹ *Supra*, p. 388. S. 18 (1) (b), which founds jurisdiction on the residence in England of the wife for three years, does not apply to a suit for judicial separation.

² 42 *Transactions of the Grotius Society*, 42-43 (J. K. Grodecki).

³ Matrimonial Causes Act, 1950, s. 18 (3).

In *Tursi v. Tursi*,¹ which was concerned with domicil, the facts were these: Foreign
decree in
the
common
domicil

Two Italian subjects, domiciled in Italy, were married at Rome in 1942. After a few months, the husband deserted his wife and never returned to her. In 1947 the wife obtained from the Civil Tribunal in Rome a decree of judicial separation, substantially similar in effect to an English decree, on the ground of desertion.

The husband remained domiciled and resident in Italy, but the wife took up her residence in England in 1949 and in 1955, availing herself of section 18 (1) (b) of the Matrimonial Causes Act, 1950,² filed a petition for divorce on the ground of her husband's desertion for the period of three years immediately preceding the presentation of her petition.

The domestic rule of English law, laid down in *Harriman v. Harriman*,³ was that a decree of judicial separation puts an end to desertion, since the respondent has no option but to live apart from the petitioner, but the rule has been altered by statute and had *Tursi v. Tursi* been a purely domestic case, the requirement of desertion during the last three years would have been satisfied. Therefore, two questions fell to be decided by Sachs J., both of which he answered in the affirmative. First, was the Italian decree to be recognized? Secondly, if so, was the statutory rule concerning the effect of a decree of judicial separation upon desertion applicable to a decree given in the foreign domicil of the parties?

The first question was dealt with on principle. Since a decree of divorce is operative in other countries if given by a court of the domicil, then on principle a less drastic decree given by that court should *a fortiori* be entitled to extra-territorial recognition.

In reaching his second conclusion upon choice of law, the learned judge was necessarily confined to English domestic law, since the Act of 1950 provides that, where a petitioner for divorce relies upon the jurisdictional ground specified in section 18, 'the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings'.⁴ Had it not been for this choice of law provision, principle would have demanded that the effect of the Italian decree upon the desertion of the husband should be determined by Italian law. Choice of
law in case
of domicili-
ary decree

¹ [1958] P. 54. 34 *B.Y.B.I.L.* 400 (P. B. Carter); 20 *M.L.R.* 636 (J. H. Grodecki).

² *Supra*, p. 388.

³ [1909] P. 123.

⁴ Matrimonial Causes Act, 1950, s. 18 (3).

Foreign
decree in
respond-
ent's
residence

No authority has been found which confirms that recognition will be extended to a decree of judicial separation granted in the country where the respondent is resident. All that can be said is that the principle of reciprocity established by *Travers v. Holley*¹ in cases of divorce should logically apply to judicial separation.

Foreign
decree in
prior
domicil of
wife

The same remarks apply to a case where the foreign decree has been based on a jurisdictional ground substantially similar to that specified in section 18 (1) (a) of the Matrimonial Causes Act, 1950.

Foreign
decree in
residence of
petitioner

It is clear that extra-territorial recognition will not be given to a decree granted in a foreign country where the petitioner alone is resident.²

(D) SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AND JACTITATION OF MARRIAGE

Restitution

The principles applicable to a suit for restitution of conjugal rights, which may be brought if either party deserts the other without reasonable cause, are the same as those that govern a suit for judicial separation.³ Jurisdiction is sufficiently founded either by residence alone⁴ or by domicil alone.⁵ On the other hand, the court refuses to entertain the suit if the respondent is neither domiciled nor resident in England.⁶

Jactitation
of marriage

A suit for jactitation of marriage, a rare proceeding, may be brought against a person who persistently and falsely boasts that he or she is married to the petitioner.⁷ The relief granted is a decree of perpetual silence. It seems clear that the jurisdiction of the court to grant this relief is sufficiently founded upon the residence of the respondent in England.⁸

¹ *Supra*, pp. 397-400.

² *Hughes v. Hughes* (1958), *Current Law Year Book*, 1958, para. 502 (Judge Rawlins sitting as a special commissioner); *The Times*, 5 June 1958.

³ *Supra*, pp. 411-12.

⁴ *Thornton v. Thornton* (1886), 11 P.D. 176.

⁵ *Dicks v. Dicks*, [1899] P. 275; *Bateman v. Bateman*, [1901] P. 136; *Perrin v. Perrin*, [1914] P. 135.

⁶ *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Firebrace v. Firebrace* (1878), 4 P.D. 63; *De Gasquet James v. Duke of Mecklenburg-Schwierin*, [1914] P. 53.

⁷ *Thompson v. Rourke*, [1893] P. 70; *Goldstone v. Goldstone* (1922), 127 L.T. 32; *Igra v. Igra*, [1951] P. 404.

⁸ *Westlake*, p. 94; *Schuck v. Schuck* (1950), 66 T.L.R. (Pt. 1), 1179.

CHAPTER XII

LEGITIMACY, LEGITIMATION AND ADOPTION

- A. Legitimacy. Pages 416-27.
- B. Legitimation. Pages 427-34.
 - 1. Legitimation *per subsequens matrimonium*. Pages 427-31.
 - 2. Legitimation by recognition. Pages 431-4.
- C. The effect in England of a legitimate status recognized by a foreign *lex domicilii*. Pages 434-7.
- D. Declarations of legitimacy and legitimation. Pages 437-9.
- E. Adoption. Pages 439-46.

THE two matters that require consideration in this chapter are legitimacy and legitimation. Legitimacy ordinarily means the status acquired by a person who is born in lawful wedlock. Legitimation means that a person who has not been born in lawful wedlock acquires the status of a legitimate person as the result of some act, such as the subsequent marriage of his parents, that occurs after the date of his birth.

Meaning of 'legitimacy' and 'legitimation'

Whether a person is legitimate or not is of the first importance, for if the will of a domiciled Englishman contains a gift to the 'children' of a specified person, the established rule of English law is that the gift means legitimate children only, unless

Importance of the subject

- (i) it is impossible in the circumstances that any legitimate children can take;¹ or
- (ii) it is clear from the words of the will that the testator intended to include illegitimate children.²

This rule applies to terms of relationship generally, such as 'sons' and 'daughters', 'grandchildren' and 'issue'.³ The same rule applies to a case of intestacy, so that, for instance, 'issue' claiming a share of the property under the Administration of

¹ *In re Wohlgenuth*, [1949] 1 Ch. 12.

² *Hill v. Crook* (1873), L.R. 6 H.L. 265, 282. *In re Herwin*, [1953] Ch. 701. The words 'child' or 'children' also include adopted children, Adoption Act, 1950, s. 13. *In re Gilpin*, [1954] Ch. 1.

³ *Wilkinson v. Adam* (1812), 1 V. & B. 122; affirmed (1823), 12 Price, 470; Hawkins on Wills, p. 102.

Estates Act, 1925, must be legitimate.¹ Again, legitimacy affects the domicile of origin of a child, the rights of guardianship possessed by his parents, and the question whether, if born abroad of a British father, he acquires British nationality.

The role of private international law in this matter is to specify what system of law shall decide whether a person is born legitimate or whether he has been legitimated.

A. LEGITIMACY

What law
supplies the
test of
legitimacy
at birth?

Before the passing of the Legitimacy Act in 1959, the rule of domestic English law was that no child acquired the status of legitimacy unless he was born in lawful wedlock, that is born of parents whose marriage was valid at the time of his birth. This exclusive test, however, was exceptional, for most countries, including Scotland, had long recognized the doctrine of the putative marriage, according to which a child even of a void marriage is also legitimate.² A common, though not a universal, qualification of this doctrine is that the spouses should have bona fide believed in the validity of their marriage.³ A question of choice of law might therefore arise if a child were born out of lawful wedlock in the country where *X* and *Y*, his parents, were domiciled and where the doctrine of the putative marriage was recognized. If, for instance, the will of a testator dying domiciled in England bequeathed a legacy to 'the children of *X* and *Y*', would the court apply the English or the foreign test in order to determine the legitimacy of the child?

On principle the
law of the
domicile of
origin is
decisive

The view expressed by several writers, that in such circumstances the English test of birth in lawful wedlock becomes applicable, is open to the insuperable objection that it fails to appreciate the true function of English law in such a case. If an English will bequeaths a legacy to the 'children' of parents who were domiciled abroad at the time of their son's birth and if his legitimacy is disputed, there are two separate questions to be resolved. The first is a question of construction—what did the testator intend by his use of the word 'children'? This is a matter for English domestic law *qua* the *lex successionis*, and the

¹ *In re Goodman's Trusts* (1881), 17 Ch.D. 266, a decision under the old Statutes of Distribution.

² For example, the French code, C.C. 201, provides that a marriage which has been contracted in good faith produces its civil effects, both as regards the spouses and the children, despite the fact that it has been declared void. Amos and Walton, *Introduction to French Law*, pp. 64–65.

³ Wolff, p. 385.

answer, of course, is that *prima facie* he must be taken to have been referring to legitimate children. The second question, whether the children are in fact legitimate, is a question not of construction, but of status determinable by the law of their domicil. The subject of inquiry is not whether the marriage of the legatee's parents is valid, but whether he is legitimate in the eyes of his *lex domicilii*—the only law that is entitled to pass upon his status.¹ English law is, indeed, relevant so far as concerns the construction of the will, but as Romer J. said in one case:

'The only relevant rule of construction is that a bequest in an English will to the children of A. means to his legitimate children and that does not carry the matter very far, for the question remains who are his legitimate children, and that is not a question of construction at all, it is a question of law.'²

This principle, that any person legitimate according to the law of his domicil, though not born in lawful wedlock, is legitimate for the purpose of succeeding to movables under an English will or intestacy has been repeatedly affirmed in a stream of cases from at least 1835 onwards,³ but with one exception,⁴ these statements were all made in cases concerned with legitimization. It is sometimes said, therefore, that they are of little value having regard to the decision of the House of Lords in *Shaw v. Gould*,⁵ which raised a question of legitimacy. | 1868.

The facts of this troublesome case were as follows:

Difficulty of reconciling *Shaw v. Gould* with principle

Facts: Certain funds were bequeathed by a testator domiciled in England in trust for Elizabeth Hickson for life and after her death in trust for her children. Certain English land was also devised after her death to 'her first and other sons *lawfully begotten*'. Elizabeth, at the age of sixteen, was induced by fraud, without the knowledge of her family, to marry a domiciled Englishman, named Buxton, at Manchester. Her friends, however, succeeded in taking her away just after the ceremony, and she never lived with her husband for a single day.

¹ See, for example, *In re Andros* (1883), 24 Ch.D. 637, at p. 639 *per* Kay J. where the position is stated with great clarity.

² *In re Bischoffsheim*, [1948] Ch. 79, 86.

³ *Birtwhistle v. Vardill* (1835), 2 CL. and F. 571, 573-4 (Alexander L.C.B. delivering the opinion of the judge to the House of Lords); *In re Don's Estate* (1857), 4 Drew. 194, 197-8 (Kindersley V.-C.); *In re Goodman's Trusts* (1881), 17 Ch.D. 266 at pp. 266 and 291 (Cotton L.J.), 296-7 (James L.J.); *In re Andros* (1883), 24 Ch.D. 637, 639 (Kay J.), *In re Bischoffsheim*, [1948] Ch. 79, 92 (Romer J.).

⁴ *In re Bischoffsheim*, *supra*.

⁵ (1868), L.R., 3 H.L. 55.

Sixteen years later, Elizabeth, having become engaged to a domiciled Englishman named Shaw, devised a scheme for obtaining a divorce in Scotland from Buxton. Shaw acquired a domicile in Scotland, and Buxton was paid £250 to go to that country for forty days. The marriage was dissolved by the Court of Session. Elizabeth then married Shaw in Edinburgh and had by him two daughters and one son, all of whom were born in the lifetime of Buxton. At the time of the present action Buxton, Elizabeth and Shaw were dead. The questions before the English court were whether the daughters and son were entitled under the will of the testator to the funds as being the 'children' of Elizabeth, and also whether the son was entitled to the land as being her 'son lawfully begotten'.

Evidence was given that by Scottish law the divorce and second marriage were valid. Also, that children born of a putative marriage, i.e. one regular in point of form but void owing to the prior existing marriage of one of the parties, were regarded as legitimate, provided that the parents were justifiably ignorant of the prior existing marriage. It was the opinion of the Scottish advocates who gave evidence that justifiable ignorance existed if the parents believed in the validity of the divorce.

The House of Lords unanimously held that the children were not entitled to take under the will.

The reason that appears to have impressed their Lordships was the supposedly logical one that since Buxton, and therefore Elizabeth, remained domiciled in England, the union between Elizabeth and Shaw was not a valid marriage according to English law, and that therefore the children were not born in lawful wedlock (which is the test of legitimacy according to English domestic law). Lord Colonsay, though impressed with the logic of the reasoning, was perplexed with doubts as to whether the status of legitimacy ought to be denied to the children. He felt that this denial was difficult to reconcile with general principles of jurisprudence or with the generally recognized rules of international law.¹

Failure of court to distinguish status of children from that of parents

It is difficult to resist the conclusion that the House of Lords lost its direction through its persistent concentration upon one general principle to the exclusion of others. It certainly is a general principle that a divorce not recognized as valid by the *lex domicilii* of the husband is invalid in England. But another principle, affirmed many times by the judiciary is that legitimacy is determined by the *lex domicilii* of the father at the time of the child's birth. Both these principles demanded attention in *Shaw v. Gould*. There is nothing inconsistent in

¹ Ibid., at pp. 969-7.

them. They are not mutually antagonistic. It was easy to argue in this manner:

The father cannot be granted the status of a husband, since the woman whom he purported to marry is, owing to the continuance of her earlier marriage, the wife of another man. Therefore the children of the father by this woman cannot be regarded as legitimate.

Nevertheless, the conclusion is a *non sequitur*. The issue was the status of the children, not of their parents. The fact that Mrs. Buxton could not claim to be Mrs. Shaw was not necessarily a bar to the legitimate status of the children. The legitimacy of a child happened at the time of the case to depend according to English domestic law upon the validity of the marriage of which he was born, but this is not and was not the case in all legal systems. If the two questions are separable by the law of the child's domicil of origin, they should be kept separate by an English court when dealing with a conflict of laws case. The courts of other countries have found no difficulty in this. Thus in South Africa it was held that the children of a polygamous union, born when the father was domiciled in India, were to be regarded as legitimate in Natal, which was his domicil at death. For the purpose of fixing the rate of succession duty payable on the father's death, the status of the mother as a 'wife' was tested by the internal law of Natal, but the status of the children was referred to their domicil of origin.¹

'It is essential', said Innes C.J., 'to bear in mind the distinction between the points to be decided in each instance. With regard to the wife, the issue is the validity of the marriage to which she is a party; with regard to the children, the issue is their right to the status of legitimacy. The wife's position cannot be considered apart from the marriage, but the position of the children may be.'²

It is submitted that in any event *Shaw v. Gould* ought to be regarded as an abnormal decision and one to be interpreted in the light of the exceptional circumstances involved. 'My opinion in this case', said Lord Chelmsford, 'is founded entirely upon the peculiar circumstances attending it.'³ It was, indeed,

¹ *Seedat's Executors v. The Master*, [1917] A.D. 302.

² In the New York case of *In re Hall*, [1901] 61 App. Div. 266, a woman obtained a divorce in Dakota that was not regarded as valid in New York. She then married a man domiciled in Dakota and a child was born of the marriage. It was held that the child was legitimate for the purpose of taking under the will of a testator who died domiciled in New York.

³ *Shaw v. Gould* (1868), L.R. 3 H.L. 55, at p. 79.

distinguished by a number of special features among which may be mentioned the following:

The Scots divorce was granted in 1846, eleven years before judicial divorce was possible in England and at a time when the prevalent view, in accordance with the unanimous opinion of the judges in *Lolley's Case*,¹ was that no foreign proceeding in the nature of a divorce could affect a marriage that had been contracted in England. In fact, in the court of first instance, Kindersley, V.-C. said: 'By the English law of marriage, an English marriage is absolutely indissoluble by the sentence of any court (of course I am speaking of the law as it stood at the time of the transactions in question which was long before the Act establishing the Divorce Court). . . . Any decree or judgment or sentence of any foreign court, purporting to dissolve such marriage, is treated as a mere nullity.'² It must be observed, however, that this view did not appeal to the House of Lords.

The conduct of the Shaws was calculated to arouse the suspicion of any court. In the greatest secrecy and with every precaution against discovery, they contrived a scheme to obtain a divorce in a court which, to their knowledge, had no jurisdiction in the eyes of English law.³

The children were legitimate by Scots law if either of the Shaws was justifiably ignorant that there was an impediment to their marriage, i.e. in their case, a prior invalid divorce. After a careful examination of the facts, Kindersley V.-C. found himself unable to agree that even Mrs. Shaw was justifiably ignorant of the true position.

Another fact which may have influenced the decision was that the will was not confined to a gift of movables to the children of Elizabeth, but also included a devise of English land to her 'first and other sons lawfully begotten'.

It is significant that in the much later case of *In re Stirling*,⁴ Swinfen Eady J. was far from repudiating the suggestion that a child might be legitimate although the previous divorce of one of his parents was invalid. It was not necessary, however, to decide the point, for it was held that the doctrine of putative marriage, upon which the argument for the child turned, did not obtain in Scotland unless at least one of the parties was ignorant of the impediment that invalidated the second marriage. The party had to be mistaken as to some fact. The ignorance alleged was that the mother of the child was unaware that her divorce from her first husband was invalid, but this was an error of law, not of fact.

¹ (1812), 2 Cl. & F. 567 (N). The view was finally repudiated in *Harvey v. Farnie* (1882), 8 App. Cas. 43.

² L.R. 1 Eq. at pp. 257-8.

³ For the details see L.R. 1 Eq. at pp. 260-2.

⁴ [1908] 2 Ch. 344.

Another authority that is sometimes said to support *Shaw v. Gould* is *In re Paine*¹ which has already been discussed in another connexion.² The question there, it will be recalled, was whether the children of *W* were legitimate for the purpose of a disposition contained in an English will.

In 1875 *W*, when domiciled in England, was married in Germany to the widower of her deceased sister. At that date a marriage between such persons was prohibited. The husband was held to have been domiciled in Germany at the time of the ceremony. The parties cohabited in England until the husband's death in 1919.

Bennett J. adopted the dual domicile doctrine of capacity³ and held the three children of the union to be illegitimate, since they had sprung from a void marriage. But, as in *Shaw v. Gould*, the possibility that the children might be legitimate according to the German law of their domicile of origin despite the absence of lawful wedlock between their parents, was not canvassed.⁴ The argument of counsel related solely to the validity of the marriage, and the only authority cited either by counsel or judge was *Mette v. Mette*⁵ where the question was not whether a child was legitimate, but whether a marriage in Frankfurt between a man domiciled in England and his deceased wife's sister, domiciled in Germany, revoked a will that he had already made.⁶

However, despite all attempts to rationalize *Shaw v. Gould*,^{In re Bischoffsheim} the fact remains that until the decision of Romer J. in *In re Bischoffsheim*⁷ it was an embarrassing obstacle to the prevalent judicial view⁸ that the legitimacy of a child is a matter for the law of his domicile of origin. This view, however, was translated into action in *Bischoffsheim's Case* where the facts were these: 1948.

facts: In 1919 *W* was married in New York to *H*, the brother of her deceased husband. It may be taken that at that time both parties were domiciled in England. The marriage was void by English law, but valid by the law of New York. After they had acquired a domicile in New York a son was born to them. The question was whether the son

¹ [1940] Ch. 46.

² *Supra*, pp. 315-16, 324.

³ *Supra*, pp. 314 et seqq.

⁴ Unless the full evidence is omitted from the reports, this was a somewhat curious finding, for the husband was resident in England for a short time before the marriage and remained resident there until his death forty-four years later. See the report of the case in 161 L.T. 266.

⁵ (1859), 1 Sw. and Tr. 416; *supra*, p. 323.

⁶ 6 I. & C.L.Q. 212 (B. D. Inglis).

⁷ [1948] Ch. 79.

⁸ *Supra*, p. 417, note 3.

was the legitimate child of his mother so as to entitle him to benefit under the will of a testator who had died domiciled in England.

Romer J. found in favour of the son, being satisfied that the governing principle may be stated as follows:

'Where succession to personal property depends upon the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e. the domicile of his parents at birth), will be recognized by our courts; and that if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject for investigation.'¹

Shaw v. Gould distinguished

He distinguished *Shaw v. Gould* by showing that since in that case the Lords chose to concentrate their attention upon the validity of the divorce they were bound to find it invalid and consequently to fix the children's domicile of origin in England. This left no room for a claim based upon the ground that their legitimacy stood apart from the validity of the divorce and that if so their domicile of origin was in Scotland.²

Principle of the legitimacy decisions applicable to legitimacy

If this decision is to be dismissed as being inconsistent with higher authority, an opinion that has been expressed on several occasions,³ the startling result ensues that in the same context legitimacy is subject to one rule, legitimation to another. Where a question arises of succession under an English testacy or intestacy, it has long been settled that if a claimant has been legitimated by the law of the country where at the time of his birth his parents were domiciled, English law 'recognizes and acts on the status thus declared by the law of the domicile'.⁴ There is no substantial difference between legitimacy and legitimation⁵ and no reason of logic or convenience why the law should relegate them to mutually exclusive categories. If from the date of the act of legitimation the child assumes the status that he would have possessed had he been born legitimate, it is incomprehensible that these two causes of the same result should be subject to divergent rules for the choice of law.

The paradox of divorcing the two methods by which the

¹ [1948] Ch. 79, at p. 92. Approved by the Privy Council in *Bamgbose v. Daniel*, [1955] A.C. 107, 120.

² *Ibid.*, at p. 97.

³ 12 *Conveyancer* (N.S.), p. 223 (J. H. C. Morris); 63 *L.Q.R.* 74 (R. S. Welsh); 64 *L.Q.R.* 199 (F. A. Mann); Falconbridge, *Conflict of Laws* (2nd ed.), pp. 747 et seqq. On the other hand, it was approved by Wolff, *op. cit.*, p. 388.

⁴ *In re Goodman's Trusts* (1881), 17 Ch.D. 266 at p. 299 per Cotton L.J. See the cases cited *infra*. p. 423, notes 3, 4, and 5.

⁵ *In re Bischoffsheim*, [1948] Ch. 79, 92.

status may be acquired may be put in another way. It is a question of construction governed by the English *lex successionis* whether the testator in his bequest to 'the children of A' intended to indicate legitimate children. If it is found that such was his intention and if a child of A claims that he has been *legitimated* according to the law of his foreign domicil of origin, this is not a question of construction, but of status for his *lex domicilii*.¹ Can it, then, be seriously argued that whether he was born legitimate in the eyes of his *lex domicilii* as distinct from having been legitimated after birth is to be classified as a question of construction?

The emergence of this principle—that the question whether a child has been born legitimate or has been legitimated is not a matter of construction, and that the English test must not be applied—has been slow and painful. The history of the authorities is as follows:

History
of the
decisions
on legitim-
acy and
legitima-
tion

1863, *Boyes v. Bedale*,² concerned with the *legitimation* of a claimant under an English *will*, insisted that the test must be satisfied.

1865–8, *Shaw v. Gould* accepted the test where the issue was the *legitimacy* of a claimant under an English *will*.

1881, the Court of Appeal in *In re Goodman's Trusts*³ overruled *Boyes v. Bedale* and discarded the test where the issue was the *legitimation* of a claimant under an English *intestacy*.

1883, *In re Andros*⁴ discarded the test where the issue was the *legitimation* of a claimant under an English *will*.

1892, *In re Grey's Trusts*⁵ discarded the test where the issue was the *legitimation* of a claimant under a *devise* of English land.

1940, *In re Paine*⁶ imposed the test where the issue was the *legitimacy* of a claimant under an English *bequest*.

1948, *In re Bischoffsheim*⁷ discarded the test where the issue was the *legitimacy* of a claimant under an English *bequest*.

It is submitted, then, that even if there had been no statutory alteration of English domestic law in 1959 the courts would have endorsed the approach to the subject made in *Bischoffsheim's Case* and would have restricted the decision in *Shaw v. Gould* to the exceptional circumstances of the case. This

Effect of
acceptance
by England
of doctrine
of putative
marriage

¹ *Supra*, p. 416.

³ (1881), 17 Ch.D. 266.

⁵ [1892] 3 Ch. 88.

² (1863), 1 H. & M. 798.

⁴ (1883), 24 Ch.D. 637.

⁶ *Supra*, pp. 315–16, 324, 421.

⁷ *Supra*, p. 421.

submission is considerably fortified now that the Legitimacy Act, 1959, has accepted the doctrine of the putative marriage. Birth in lawful wedlock no longer represents the sole test of legitimacy according to English domestic law, for the Act now provides that where the father is domiciled in England, a child born of a void marriage is to be treated as legitimate if both or either of his parents reasonably believed that the marriage was valid.¹ Where, therefore, the father is domiciled in a foreign country where a similar doctrine is recognized, there would be less justification even than formerly for denying the legitimate status of a child born of a void marriage.²

The present rule relating to legitimacy
The present position, therefore, may with some confidence be expressed in the following terms:

A claim made by the devisee of English immovables or, in the case of movables, by a beneficiary under a settlement the proper law of which is English, or under the testacy or intestacy of a person who died domiciled in England, will not, subject to two exceptions,³ succeed unless the claimant is legitimate. He is regarded as having satisfied this condition, if he is legitimate according to the law of his domicile of origin, i.e. the law of the country where at the time of his birth his father was domiciled.

This statement requires elaboration in four respects.

Limited
nature of
the rule

First, the rule as stated is limited to cases where English domestic law represents the *lex successionis* or the proper law of a settlement. If, for instance, an English court were seised of a case concerning a devise of French immovables or a bequest of English movables made by a testator who died domiciled in France, the legitimacy of the donee, if in doubt, would be determined in accordance with the French test.

The rule, though limited in terms to proprietary claims since the English precedents are confined to this field, would presumably hold good if a question of legitimacy were to arise in some other connexion, as for example under the declaratory jurisdiction of the court.⁴

Controversy as to
meaning of
'domicil of
origin'

Secondly, the statement in the rule that the domicile of origin means the country in which the father is domiciled at the birth of the child is not supported by indisputable authority. Some of the judges have approved this view, but others, probably having in mind the usual case where the father and mother possess a common domicile, have preferred to speak of 'the

¹ Legitimacy Act, 1959, s. 2 (1), (2). For a fuller statement, see *infra*, pp. 426-7.

³ *Supra*, p. 415.

² 8 *I. & C.L.Q.* 725.

⁴ *Infra*, pp. 437-9.

domicil of the parents', a view which, if adopted, would require each *lex domicilii* to be satisfied. It is, of course, true that to attribute to the child the domicil of his father where his parents have different domicils is to beg the question of his legitimacy, for, since the domicil of an infant is that of his father if legitimate but of his mother if illegitimate,¹ it is impossible to fix his domicil until the question of his legitimacy has been settled.² Nevertheless, logic must not be allowed to impede the best solution of the problem, and the solution most favourable to the child, it is submitted, is to agree with Wolff that 'legitimacy is concerned with the relationship between child and father',³ and that therefore the domicil of the natural father should be decisive.⁴ It would seem that it is this relationship upon which most emphasis is placed by the Continental legal systems.⁵ In the leading case of *In re Grove*,⁶ Stirling J., after citing authority for the view that 'the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of his country of origin',⁷ i.e. the law of the place where his parents were domiciled at his birth, went on to say:

'If the parents have different domicils (as may happen where they are not married), the authorities shew that the domicil of the father is to be regarded, and not that of the mother.'⁸

This is admitted without question in cases of legitimation. Moreover, it is significant that the operation of the English Act which now recognizes the legitimacy of a child born of a void marriage is confined to a case where the father is domiciled in England at the time of the child's birth.⁹ The fact that the legitimacy may not be recognized in the separate domicil of the mother is irrelevant.

Thirdly, the decisive date for fixing the domicil of origin is the birth of the child. A child, no doubt, is deemed at birth to have been in existence from the time of conception,¹⁰ and if

Effect of
change of
domicil
after
conception

¹ *Supra*, p. 189.

² 63 L.Q.R. 70 (R. S. Welsh).

³ *Private International Law*, p. 382.

⁴ *Schmitthoff*, op. cit., p. 283; *contra*, Dicey, p. 421.

⁵ 8 I. & C.L.Q. 685 (Egon Guttman).

⁶ (1888), 40 Ch.D. 216.

⁷ These words are from the judgment of James L.J. in *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 296.

⁸ *In re Grove*, *supra*, at p. 224. See also *Re Don's Estate* (1857), 4 Drew. 194, 198 (Kindersley V.-C.); *In re Andros*, (1883) 24 Ch.D. 637, 642 (Kay J.).

⁹ Legitimacy Act, 1959, s. 2 (2).

¹⁰ *In re Salaman*, [1908] 1 Ch. 4. But see *Elliot v. Lord Joicey*, [1935] A.C. 209.

the parents change their domicile between the time of conception and of birth it is arguable that the father's *lex domicilii* at the former time deserves consideration, especially where, as opposed to the *lex domicilii* at birth, it recognizes the child as legitimate.¹ The interests of the child demand, it has been said, that the recognition of his legitimacy in either domicile should be decisive.² There is no authority in point, but it is probable that the English courts would regard the domicile at the time of birth as decisive though it might possibly adopt the principle of the most favourable law. A somewhat analogous question arises in the case of a posthumous child, whose mother has changed her domicile since the death of her husband. Is the *lex domicilii* of the father at the time of his death or the *lex domicilii* of mother at the time of the child's birth to determine the question of legitimacy? The latter is probably the correct solution. The domicile or origin of a posthumous child is generally that of his mother,³ and since his father is dead, the question of his legitimacy concerns him and his mother alone.

Posthumous
children

Problem
where birth
in lawful
wedlock
does not
confer
legitimacy
in domicile

Fourthly, the rule stated above⁴ allocates a question of legitimacy to the law of the domicile of origin. Principle requires that this personal law should apply exclusively, since it is the only law competent to determine the status of the child. Nevertheless, if a case were to arise in which a child, though born in lawful wedlock, was for some reason not regarded as born legitimate, as for example because he was not conceived in lawful wedlock, it is probably a safe assumption that an English court would be satisfied with the practically universal test of birth in lawful wedlock. This break with principle might be justified by the paramount importance of communicating to the child the beneficial status of legitimacy if some rational ground for doing so exists.

Provisions
of the
Legitimacy
Act, 1959

It remains to add a few words upon the Legitimacy Act, 1959, in so far as it introduces the doctrine of the putative marriage into England. The main provision is as follows:

Subject to the provisions of this section, the child of a void marriage, whether born before or after the commencement of the Act, shall be

¹ In Denmark the date of conception is apparently preferred to the date of birth, Wolff, s. 359.

² Taintor, 18 *Canadian Bar Review*, 596-7.

³ There seems to be no English authority upon the domicile of a posthumous child, but juristic opinion favours the view that it is the same as the mother's: Westlake (7th ed.), s. 250; Dicey, p. 93; Nelson p. 19; Foote (5th ed.), p. 78.

⁴ Page 424.

treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid.¹

This provision, however, does not apply unless the father of the child was domiciled in England at the time of the birth or, if he died before the birth, was so domiciled immediately before his death.² Where this condition is not satisfied, the legitimacy of a child born of a void marriage must be determined, as we have seen, by the law of his domicile of origin.

In a sub-section which is susceptible of more than one interpretation,³ a void marriage for the purposes of the Act is defined as

a marriage, not being voidable only, in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have or would have had such jurisdiction if the parties were domiciled in England.⁴

The purport of this language certainly does not leap to the eye, but its probable object is to exclude any union which in the eyes of English law has no claim to be a marriage at all, as for example one springing from concubinage.

(B) LEGITIMATION⁵

In the various legal systems of the world at least three Methods of legitimation different methods are found by which a person, not born with the status of legitimacy, may be later legitimated. These are: subsequent marriage of the parents; recognition of the child by the father; and adoption. Each of these methods requires separate treatment.

1. *Legitimation 'per subsequens matrimonium'.*

From the time of Constantine, the rule of Roman law was that children born before marriage were made legitimate by Legitimation by subsequent marriage

¹ S. 2 (1). An adoption order obtained by the father and mother before the Act came into operation may be revoked by the court; Adoption Act, 1960, s. 1 (1).

² S. 2 (2).

³ For various views, see 8 *I. & C.L.Q.* 725-6 (Gareth H. Jones); 9 *I. & C.L.Q.* 321-2 (Solly Tucker); 23 *M.L.R.* 58-59 (Otto Kahn-Freund).

⁴ S. 2 (5).

⁵ On the subject generally see articles by Taintor in 18 *Canadian Bar Review* (1940), 589 et seqq. and 691 et seqq.; and by Mann in 56 *L.Q.R.* 112 et seqq.

the subsequent marriage of their parents. This rule became part of canon law about the twelfth century, and was later adopted by practically all the legal systems on the Continent, and in South America. It has received statutory recognition in most of the North American States. Until the Legitimacy Act of 1926, however, it formed no part of the law of England or of Wales or of Ireland, though it obtained in Scotland, the Isle of Man and the Channel Islands.¹

Common law rule as to recognition of legitimation by subsequent marriage. The role of private international law is to choose the system of law which shall determine whether legitimation by this method is effective or not. The rule finally established at common law by *In re Grove*,² after some hesitation,³ is that a foreign legitimation *per subsequens matrimonium* is not recognized in England unless the father is domiciled, both at the time of the child's birth and also at the time of the subsequent marriage, in a country whose law allows this method of legitimation.⁴

In re Goodman's Trusts 1881. A simple illustration of the working of the rule is afforded by the case of *In re Goodman's Trusts*,⁵ where a domiciled Englishwoman had died intestate in respect of a large sum of money, and it was necessary to decide which of her brother's children were entitled to share therein, as being her 'next of kin' under the Statutes of Distribution. The relevant events in her brother's life were chronologically as follows.

- (a) While domiciled in England he had three children by Charlotte Smith, to whom he was not married.
- (b) He acquired a Dutch domicil, and had a fourth child, Hannah, by Charlotte Smith.
- (c) He married Charlotte Smith in Amsterdam.
- (d) While still domiciled in Holland he had a fifth child, Anne, by Charlotte Smith.

Legitimation by subsequent marriage is part of Dutch law. It was, therefore, held on the above facts that Hannah and Anne were alone legitimate for the purposes of the English intestacy. It was only in their cases that at the two critical moments, birth and marriage, the *lex domicilii* of the father recognized this particular form of legitimation.

¹ For a full account of the acceptance of the rule see 36 *L.Q.R.* 255.

² (1887), 40 Ch.D. 216.

³ See, for example, *Boyes v. Bedale* (1863), 1 H. & M. 798, disapproved by C.A. *In re Goodman's Trusts*, *infra*.

⁴ *In re Goodman's Trusts* (1881), 17 Ch.D. 266; *In re Andros* (1883), 24 Ch.D. 637; *In re Grove* (1887) 40 Ch.D. 216.

⁵ (1881), 17 Ch.D. 266.

This common law rule, that the father's domicile at both dates must recognize legitimation, applies not only to persons claiming money or other chattels personal upon intestacy, but also to a gift by will of personal chattels¹ or of freehold land,² if made to persons covered by some general descriptive title such as 'children'.

It is unnecessary, however, to consider this common law principle further, for, though not abrogated, its operation is immensely curtailed by the Legitimacy Act, 1926,³ which makes legitimation by subsequent marriage part of the law of England. The first section of the statute alters the internal law of England and provides that where the parents of an illegitimate person marry, or have married, one another, whether before or after the commencement of the Act, the marriage shall, if the father was or is *at the date of the marriage* domiciled in England or Wales, render that person, if living, legitimate. Such legitimation becomes effective on 1 January 1927 (the date of the commencement of the Act) if the marriage took place previously, but if not, then from the date of the marriage.⁴

With regard to persons who are not domiciled in England or Wales, section 8 (1) provides as follows:

'Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, *at the time of marriage*, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognized as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.'⁵

This sub-section is the one that affects private international law, and it discards the old rule that the *lex domicilii* of the father at the time of the child's birth must be taken into account. The *lex domicilii* of the father at the time of marriage is the sole decisive factor. It is this law which decides, for instance, whether something more than mere marriage, such as a formal acknowledgement, is necessary to effect legitimation.

¹ *In re Andros* (1883), 24 Ch.D. 637.

² *In re Grey's Trusts*, [1892] 3 Ch. 88.

³ 16 & 17 Geo. V, c. 60.

⁴ S. 1 (1).

⁵ S. 8 (1)

Legitima-
tion by
subsequent
marriage
adopted by
English law

Marriages
where
spouses
domiciled
abroad

Filius adul-
terinus
now
included In the following sub-section the privilege of legitimation is withheld from the *filius adulterinus*, i.e. a person whose father or mother was married to a third person at the time of his birth.¹ This austere provision, however, was repealed by the Legitimacy Act, 1959, which came into operation on 29 October 1959.² The repeal is retrospectively applicable to a child alive at that date, even though the marriage of his parents may have been celebrated earlier.³

Rights of
legitimated
persons
to take
interests in
property The right of a person legitimated by the subsequent marriage of his parents to take interests in property is limited as follows by the Act of 1926: he and his spouse, children or more remote issue are entitled to take any interest—

- (a) in the estate of an intestate dying after the date of legitimation;
- (b) under any disposition coming into operation after that date;
- (c) by descent under an entailed interest created after that date.⁴

Intestacy
of legitim-
ated person If a legitimated person, or his child or more remote issue, dies intestate, the order of succession to his estate is what it would have been had he been born legitimate.⁵

Cases in
which
common
law still
applicable It has been decided that the provision in the Act of 1926 regarding foreign legitimations is an addition to, not a replacement of, the common law principle.⁶ The rule laid down by *In re Grove*⁷ may therefore still be invoked in at least two cases.

First, where it is desired to prove that a child was legitimated before 1927, for no marriage celebrated before that date is effective for the purposes of the Act.

Secondly, it is necessary to fall back on the common law if a person, alleged to have been legitimated, claims under a will or other instrument that came into operation before the date of his legitimation. Thus, in one case:

An English testator died in 1939 and bequeathed certain legacies to the children of his daughter, X. In 1943, X gave birth to an illegitimate son whose father was a man domiciled in Italy. In 1949, she married the father while he was still domiciled in Italy.⁸

The son, though no doubt statutorily recognized as legitimate, could not claim the legacy by virtue of the Act, since his

¹ Ibid., s. 1 (2).

³ Ibid., s. 1 (2).

⁵ Ibid., s. 4.

⁷ *Supra*, p. 428.

² Legitimacy Act, 1959, s. 1 (1).

⁴ Legitimacy Act, 1926, s. 3 (1).

⁶ *In re Hurll*, [1952] Ch. 722.

⁸ *In re Hurll*, *supra*.

legitimation had not been effected before the will of the testator came into operation. Quite apart from the Act, however, his legitimation was valid at common law since his father was domiciled in Italy at the decisive dates of birth and marriage, and at common law it is wholly irrelevant for the purpose of claiming under an instrument of gift whether the instrument comes into operation before or after the legitimation. The son, therefore, was entitled to the legacies independently of the Act.

(2.) *Legitimation by recognition.*

In several States in Europe and in North and South America a father is allowed to legitimate his child by formally recognizing it to be his own. This method derives from the *legitimatio per rescriptum principis* of Roman Law. The first question that it raises in private international law is—By what legal system will the English courts determine the validity of this particular form of legitimation? Is it sufficient that it is valid by the *lex domicilii* of the father at the time of recognition, or, like legitimation *per subsequens matrimonium* before the Legitimacy Act, 1926, must it also be valid by the *lex domicilii* of the father at the time of the child's birth? The matter has been considered in only one case—*In re Luck's Settlement Trusts*¹—where the facts were as follows:

What law decides validity of recognition?

✓ 1940.

facts. Under the will of George Luck, a British subject domiciled in England, certain funds were held in trust for all his children attaining twenty-one. Each child was to receive the income of his share for life, and after his death the capital was to be divided equally among his children at twenty-one. The marriage settlement of George limited further sums in the same manner, except that only those grandchildren born within twenty-one years of the death of the survivor of George and his wife were to take a share of the capital. The survivor died in 1896. Therefore, no grandchild was entitled under the settlement trusts unless he was alive and legitimate in 1917 at the latest.

In re Luck

Charles was a son of George Luck. He married in 1893, but in 1906, while still married, he became the father of an illegitimate son, David, in California. At this time both he and David's mother were domiciled in England. After the dissolution of his first marriage he married a second wife. In 1925 he signed a formal document with the assent of his second wife by which he acknowledged David to be his legitimate son and adopted him as such.² At this time Charles was domiciled in

¹ [1940] Ch. 864.

² It is important to notice, as F. A. Mann has shown (57 L.Q.R. 119), that the Californian method was not adoption, but legitimation by recognition. The unwary might assume from the judgments in the Court of Appeal that it was equivalent to adoption in the English sense.

California. It was assumed by the Court of Appeal that David's mother was also domiciled there. By the law of California the acknowledgment of 1925 operated to legitimate David from his birth in 1906.

The question that arose on these facts was whether David was entitled to a share under the will and marriage settlement of his grandfather, George. To take under the latter he was required to be a legitimate grandchild alive as such in 1917.

✓ The Court of Appeal, reversing Farwell J., held that David was entitled neither under the will nor under the settlement. The reasoning was that legitimation by subsequent marriage is disregarded at common law unless allowed by the *lex domicilii* governing the father at the time both of the birth and the marriage; that the relevant judgments regard this rule, not as confined to the single case of a subsequent marriage but as applicable to all forms of legitimation; and that in any case both convenience and principle demand the application of a uniform rule to all forms. Therefore David was disqualified, since at the time of his birth his father was subject to English law, by which legitimation by recognition is not allowed.

Criticism
of the
decision

It is submitted that this equation of recognition with legitimation by subsequent marriage is unwarranted. It is essential to a proper understanding of the matter to realize why the common law regards the domicil of the father at the time of the child's birth as vital in the particular case of legitimation by subsequent marriage. The theory, originating in Roman law, is that at the time of the birth the father implicitly contracts to marry the mother at a later date and thereby to legitimize the child. It follows from this that if at the time of the birth the father is domiciled in a country where a later marriage cannot alter the status of the child, he cannot make a valid contract concerning legitimation.¹ In other words the child at birth must possess, according to the *lex domicilii* of his father, a potential capacity to be legitimated by the subsequent marriage of his parents.² Otherwise he bears throughout his life the indelible stain of bastardy. There may have been some slight justification for this far-fetched theory of a fictitious contract in the internal law of Rome, of which *legitimatio per subsequens matrimonium* was a regular feature, but its extension to the sphere of private international law and to other forms of legitimation is the negation of common sense and principle. It is surely pure

¹ *In re Wright's Trusts* (1856), 2 K. & J. 595, 604-5.

² *In re Luck*, [1940] Ch. 864, at pp. 883, 896; *In re Grove* (1887), 40 Ch.D. 216, at p. 233.

fantasy to suggest that the recognition of a child as legitimate is merely the performance of a contract made at his birth, and that if the contract is void at that date because the *lex domicilii* of the father does not allow such legitimation, then a recognition, though effected at a time when the father and son have acquired a new domicile, is perforce void. 'Times are not what they once were, and we live in an age too practical to build our law upon the unstable foundation of fictions.'¹ To make the child's potential capacity at birth relevant to his acquisition of a certain status at a later date is contrary to established principle, for the question of his present status depends upon his present domicile, not upon one that he may have had at some earlier stage in his life. The common law rule based upon the child's capacity at birth was never in fact extended to cases other than legitimation by subsequent marriage. It has been abolished even in this connexion by the Legitimacy Act, 1926, and gratuitously to prolong its life and to extend its operation is a retrograde step. The retrogression is very clear when tested by the standards of natural justice. Luxmore L.J. after insisting that the *lex domicilii* at birth must contain the potentiality of subsequent legitimation proceeds as follows:

'It is, in our opinion, only within these narrow limits that the English law recognizes an exception to the principle that bastardy is indelible, a principle which it always steadfastly maintained in opposition to the civil and the canon law, save in so far as it was forced to recognize an exception in cases of persons not domiciled in England.'²

But to continue this steadfastness to the true faith, after its abandonment by the legislature in the most frequent type of legitimation, savours of a determination to visit the sins of a father upon his children. In fact the decision has been most generally criticized on the ground that, though it is obviously convenient that one principle should govern all types of legitimation, it is a little eccentric to choose one that has been abrogated by statute.³

It is therefore to be hoped that if the occasion arises the highest tribunal will prefer the dissenting judgment of Scott L.J. who agreed with Farwell J. in the court below. Scott L.J. argued in a convincing manner and at no little length that status, the outstanding characteristic of which is its 'quality

View of
Scott L.J.

¹ *Blythe v. Ayres* (1892), 96 Cal. 532, Lorenzen, p. 756, per Garoutte J.

² *In re Luck*, [1940] Ch. 864, at p. 883.

³ 21 *B.T.B.I.L.* 209; 18 *Canadian Bar Review*, 652; 57 *L.Q.R.* 120.

of universality', once determined by the law of the domicile, must be judicially recognized all the world over. At a time when David and his father and mother were domiciled in California, his father made a certain declaration according to Californian law. The effect of this by that law was to clothe David with the status of a legitimate person. Therefore, 'that status, established by the law of that foreign country, was under English law one which it was the duty of the English court to recognize, and prima facie to enforce in accordance with its nature and attributes as determined by the law of that country'.¹ It is the law of the domicile at the time when the legitimation is effected that should alone be considered.

The true
solution of
In re Luck

The majority of the judges were perturbed by the idea that the law of California might alter the status of David at a time when he was a domiciled Englishman, a position which would arise if the recognition of 1925 were regarded as relating back to the date of his birth. This would indeed be objectionable in principle, but if the unnecessary suggestion of relating back had not been made, and if the legitimation had been construed by the court as operating from the time of the recognition, there would have been no break with principle. The law of California is entitled to create the status of legitimation between two persons domiciled in that State.² 'And on this view, which we suggest to be really the best view, David would be recognized as having been legitimate only as from 1925, but not before, and therefore he would have been able to take under the trusts established by the will, but possibly would not have been able to take under the marriage settlement trusts, because he was not a legitimate child in 1917.'³

C. THE EFFECT IN ENGLAND OF A LEGITIMATE STATUS RECOGNIZED BY A FOREIGN *LEX DOMICILII*

English
court acts
on the
status of
legitimacy
recognized
in the
domicil of
origin

Once it has been ascertained that a child has acquired the status of a legitimate person under the appropriate law or laws, the effect of that status for the purposes of English law is what it is according to the *lex domicilii* of the child at the time of his birth. The creation of the status may have required a reference

¹ [1940] Ch. at p. 888.

² 18 *Canadian Bar Review*, 624.

³ W. E. Beckett, 21 *B.T.B.I.L.* 210. As Westlake, *Private International Law*, p. 105, points out, Chitty J. in *Re Ullee* (1885), 53 L.T. (N.S.) 711 was clearly inclined to Mr. (later Lord) Macnaghton's submission that the personal law of the father governs the effect of legitimation by recognition. It is submitted, however, that David could certainly not have taken under the settlement.

to two laws, as in the case at common law of legitimation by subsequent marriage, but the attributes of the status, its effect and consequences, are determined solely by the law of the child's domicile of origin, whether the event from which his legitimacy sprang was birth, the subsequent marriage of his parents or something in the nature of recognition.

'I am of opinion,' said Cotton L.J. in a leading case 'that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicile.'¹

Thus, as we have already seen, a child legitimate by the law of his domicile of origin, qualifies as a legatee,² next-of-kin³ or devisee of English immovables⁴ for the purpose of the English law of succession.

The one exception to the general principle laid down by Cotton L.J. arises where a person, legitimate by the law of his domicile of origin but not born in lawful wedlock, claims to succeed as the heir to an English entailed interest. The construction put upon the Statute of Merton, 1235, which declared the common law with regard to the inheritance of land, was that nobody could succeed as heir except a person born in lawful wedlock. To be the legitimate son of the ancestor was not in itself sufficient. Therefore, in *Doe, d. Birtwhistle v. Vardill*,⁵ it was held that a person, born of parents who were domiciled in Scotland at the time both of his birth and of their subsequent marriage, could not succeed as heir to land in Yorkshire of which his father died intestate. Lord Brougham, who was opposed to the decision, demonstrated the inconvenience of this rule in the following words:⁶

Intestate
succession
to English
land an
exception
to the rule

'That a man may be a bastard in one country and legitimate in another seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as a bastard when he comes into one court

¹ *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 292.

² *Skottowe v. Young* (1871), L.R. 11 Eq. 474; *In re Andros* (1883), 24 Ch.D. 637; *In re Bischoffsheim*, [1948], Ch. 79.

³ *In re Goodman's Trusts* (1881), 17 Ch.D. 266.

⁴ *In re Grey's Trusts*, [1892] 3 Ch. 88.

⁵ (1826), 5 B. & C. 438; (1835), 2 Cl. & F. 571; opinion of the judges delivered to the House of Lords (1835), 2 Cl. & F. 582; further opinion of the judges (1839), 7 Cl. & F. 895.

⁶ 2 Cl. & F. at 595.

to claim an estate in land, and legitimate when he resorts to another to obtain personal succession.'

The justification of the decision, however, was explained forty years later by James L.J. as follows:¹

'What the assembled judges said in *Doe v. Vardill*, and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. . . . But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy.'

It was later decided that a legitimating father could not succeed to his son's land.²

Rule in
Birtwhistle
v. Vardill
of little
importance
now

The rule in *Doe, d. Birtwhistle v. Vardill* is now of little importance. Its operation has been, in the first place, severely limited by the Administration of Estates Act, 1925. This statute abolishes heirship in the case of the fee simple estate,³ and provides that upon intestacy the land shall be held by the personal representatives upon trust for sale.⁴ The money arising from the sale does not pass to an heir, but is distributed among the relatives of the deceased according to the scheme established by the Act.⁵ The two cases in which it may still be necessary to discover the heir to a fee simple estate according to the old rules of descent are unlikely to arise in connexion with private international law, and need not be discussed.⁶

The result, then, of this Act was that heirship became confined to the case of an entailed interest, so that if the facts of *Doe v. Vardill* had occurred again in 1926 the decision would have been the same, provided that the intestate was a tenant in tail. The rule established by that decision is, however, almost

¹ *In re Goodman's Trusts* (1881), 17 Ch.D. 266, 299.

² *In re Don's Estate* (1857), 4 Drewry 194. The rule would also seem to apply to a claim of succession to a peerage: *The Strathmore Peerage Case* (1821), 6 Bli. (N.S.) 487; 54 Lords Jo. 554 (where it was held, however, that the claimant had not been legitimated); *Shedden v. Patrick* (1854), 1 Macq. H.L. Cas. 535.

³ S. 45 (1).

⁴ S. 33.

⁵ S. 46.

⁶ They arise under the Law of Property Act, 1925; i.e. (a) where there is a limitation that would formerly have been caught by the Rule in *Shelley's Case* (s. 131); (b) where there is an express limitation to the 'heir' of a deceased person (s. 132). For this last case see Cheshire, *Modern Real Property* (8th ed.), pp. 766-7

entirely excluded even in the case of an entailed interest, for the Legitimacy Act, as we have seen, provides that, where a person has been legitimated by the marriage of his parents, he and his spouse, children or more remote issue, shall be entitled to take

by descent under an entailed interest *created* after the date of legitimation,

in like manner as if the legitimated person had been born legitimate.¹ A later section extends these provisions to a person recognized as having been legitimated because his father and mother married in a domicile by the law of which a subsequent marriage is a mode of legitimation.²

The doctrine of *Doe v. Vardill* will therefore still apply in the case of an entailed interest, if the creation of the entail has preceded the legitimation or if the foreign legitimation has been effected otherwise than by subsequent marriage.

D. DECLARATIONS OF LEGITIMACY AND LEGITIMATION

Where an action is brought to enforce a legal right or a claim to property, the court has jurisdiction to determine the legitimacy of any person, whether living or not, if, as for example in *Bischoffsheim's Case*, this is essential to the plaintiff's success. No action at common law, however, will be entertained if brought for the sole purpose of obtaining a declaration of legitimacy.³ As Singleton L.J. put it in another but analogous context: 'The court will not grant a declaration in the air.'⁴ Only the person whose legitimacy is in question can take any steps to this end, and the only process open to him is to petition for a declaration of legitimacy under the Matrimonial Causes Act, 1950, which is the modern equivalent of the original Legitimacy Declaration Act, 1858.

Declaration
of legi-
timacy:
Matrimo-
nial
Causes
Act, s. 17

The jurisdiction conferred upon the court by the Act of 1950 is restricted in two respects:

First, the petitioner must be either a British subject or a person whose right to be deemed a British subject depends upon his legitimacy or upon the validity of any marriage.

Secondly, the petitioner must either be domiciled in England or Northern Ireland or must be the claimant of real or personal property situated in England.

¹ S. 3 (1).

² S. 8 (2).

³ *Yool v. Ewing*, [1904] 1 Ir. Rep. 434.

⁴ *Har-Shefi v. Har-Shefi* (No. 1), [1953] P. 161, 166.

If these two conditions are satisfied the declaration of the court may take any one of the following four forms:

that the petitioner is a British subject, that he is legitimate or illegitimate, that his marriage is valid or invalid, that the marriages of his parents or grandparents were valid or invalid.¹

Declaration of legitimation: Matrimonial Causes Act, s. 17 (2) This declaratory jurisdiction was extended to legitimation in 1926 when legitimation by subsequent marriage was accepted by English internal law. The matter is now dealt with by the following subsection of the Matrimonial Causes Act, 1950:

Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply by petition to the court for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

In this subsection the expression 'legitimated person' means a person legitimated by the Legitimacy Act, 1926, and includes a person recognized under section eight of that Act as legitimated.²

Scope of s. 17 (2)

This definition of a legitimated person requires a little consideration. Its ostensible purport is that only a person legitimated by virtue of the Act may petition for a declaration of his status. It will be recalled that section eight recognized the legitimation of a person whose parents married abroad provided that it was recognized by the law of the country in which his father was domiciled at the time of the marriage.³ In such a case, therefore, the legitimated person satisfies the definition in the subsection. It will also be recalled that the rule at common law, which still exists, is that a foreign legitimation must be recognized if the *lex domicilii* of the father at the time both of the birth of the child and of the marriage admitted this form of legitimation. A person, therefore, who is forced to rely upon the common law rule cannot claim to have been legitimated by virtue of the Legitimacy Act. This will be the case where his legitimation was completed before 1 January 1927, the date when the Act came into operation. But if his legitimation has been effected after 1926 and if it has satisfied the common law requirements, it will also have satisfied the statutory requirement relating to the father's domicile at the time of the marriage. Is it to be said, however, that since his legitimation happens to be recognized independently of the

¹ Matrimonial Causes Act, 1950, s. 17 (1), as amended by the Legitimacy Act, 1959, s. 2 (6).

² Matrimonial Causes Act, 1950, s. 17 (2).

³ *Supra*, p. 429.

Act he is not a person recognized under section eight of the Act as legitimated, and that he is therefore precluded from petitioning for a declaration of his status? This would obviously not be a sensible interpretation and is probably not a necessary one. A person does not cease to be recognized as legitimated in accordance with the requirements of a statute merely because he is alternatively recognizable as legitimated in accordance with common law requirements. It is probably true that in most cases the father does not change his domicile between the birth of his child and his marriage to the mother, and therefore, if the subsection is restrictively interpreted, the declaratory jurisdiction will not be available to the majority of persons legitimated by the marriage of their parents.

It will be noticed that the jurisdiction to make a declaration of status differs according to whether the petition relates to legitimacy or to legitimation. In the former case, the petitioner must be a British subject, or a person claiming British nationality or a claimant of property situated in England, but in the case of legitimation there are no restrictions as to person, and the jurisdiction may be invoked even by a foreigner domiciled abroad. A petitioner cannot, of course, obtain a declaration that he is a legitimated person unless the status has derived from the marriage of his parents.

The two
declara-
tions
contrasted

A declaration of status, whether of legitimacy or legitimation, operates *in rem*. It binds the Crown and all other persons, but it does not prejudice any person if it is obtained by fraud or collusion nor any person who has not been cited or made a party to the proceedings.¹

Effect of a
declaration

E. ADOPTION

✓ *English adoptions.* Adoption, the process by which an infant is brought into the family of the adopter, was introduced into England by the Adoption Act, 1926, which was replaced by the Act of 1950 and finally by the Act of 1958. Unlike the case in some other countries, adoption can be effected only by an order of the High Court, County Court, or magistrates' court, after a judicial inquiry directed mainly to ensuring that such an order will be for the welfare of the infant.

Method of
adoption in
England

The effect of an order is to take away from the infant whatever legal benefits nature conferred upon him and to transfer all obligations towards him to the adoptive parents who by

General
effect of
adoption

¹ Matrimonial Causes Act, 1950, s. 17 (5).

nature have no obligation towards him at all.¹ In the words of the Act: 'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage shall be extinguished . . . and shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock.'²

Proprietary
effect of
adoption

This absorption of the infant in a new family is also effective for the purposes of the disposition of property, since the Act provides that in the case of a disposition made after the date of an adoption order, an adopted infant is *prima facie* to be regarded as the child of his adopter, not of his natural parents.³ So also in the case of an intestacy. If, at any time after the making of an adoption order, the adopter or the adopted infant or any other person dies intestate, his property shall devolve in all respects as if the adopted infant were the child of the adopter born in lawful wedlock.⁴ In short, there is a complete and fundamental change in the status of the infant. He becomes a child in law of his adoptive parent or parents to the exclusion of his natural parents.

Jurisdic-
tion of the
English
court

The jurisdiction of the English court to make an adoption order depends upon domicile and residence. The applicant for the order must be domiciled in England,⁵ and both he and the infant must be resident in England.⁶ This requirement of joint residence, however, is relaxed in the interests of applicants who, though temporarily resident abroad, intend to settle in England when the purpose of their foreign residence has been effected. In such a case the High Court or a county court⁷ may make an adoption order provided that the applicant has been 'living' in England for at least three months prior to the order.⁸

Should the
foreign *lex*
domicilii of
the infant
be con-
sidered?

The absence of any requirement that the infant should be domiciled in England raises a question of choice of law. If an

¹ *Skinner v. Carter*, [1948] Ch. 387, 395, *per* Lord Greene M.R.

² Adoption Act, 1958, s. 13 (1).

³ *Ibid.*, s. 16 (2). In this context, a disposition by will is deemed to be *made* on the date of the testator's death, *ibid.*, s. 17 (2).

⁴ *Ibid.*, s. 16 (1).

⁵ *Ibid.*, s. 1 (1).

⁶ *Ibid.*, s. 1 (5).

⁷ *Ibid.*, s. 12 (2). Not a magistrates' court.

⁸ *Ibid.*, ss. 12; 3 (2). Thus *Re Adoption Application No. 52 of 1951*, [1952] Ch. 16, a decision under the Act of 1950, would now be decided differently. For an elucidation of the strange manner in which the new rule is drafted, see 8 *I. & C.L.Q.* 569-71 (E. J. Griew).

applicant, domiciled and resident in England, applies for an adoption order in respect of an infant resident in England but domiciled abroad, will the court have regard for the substantive requirements of the foreign *lex domicilii*, which may differ widely from their English equivalents in such matters as the age of the respective parties and the consents of relatives? The terms of the English Statute are, indeed, such that an adoption order made by the court would not be vitiated by a failure to take account of the foreign law, yet it is submitted that to make the *lex fori* the sole arbiter of the matter would be contrary to principle and often prejudicial to the well-being of the infant.¹ The admitted and basic feature of status as fixed by the *lex domicilii* is its universality.² The status attributed to a child in his domicil of origin is entitled to universal respect. It is, therefore, contrary to principle for the English court to make an adoption order which affects to destroy that status and to substitute another that is fundamentally different. Moreover, such an order would scarcely be recognized in the domicil of origin, with the result that the infant would be the child of *X* in England but of *Y* in all other countries, a situation strangely at odds with the statutory requirement that adoption must not be permitted unless it will promote the welfare of the infant.³

The contrary view, that the English statute must be exclusively applicable on practical grounds, has been vigorously advanced by a learned writer.⁴ 'Adoption in particular is now, especially since the legislation of 1949 and of 1958, so intimately linked with the activities of the welfare authorities that it has become almost impossible to view an English adoption otherwise than in a purely English context.'⁵ It might, indeed, be extremely difficult to blend two opposing systems of adoption law, but none the less the fact remains that to impose a status upon a child in conflict with that which he possesses in his domicil of origin, to create as it were a limping infant, would be a doubtful blessing for the welfare authorities to bestow upon him.⁶

¹ Sec 8 *I. & C.L.Q.* 9 (R. H. Graveson).

² *In re Luck's Settlement Trusts*, [1940] Ch. 864, 894, per Scott L.J.

³ Adoption Act, 1958, s. 7 (1) (b).

⁴ Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law* (The Lionel Cohen Lectures, 6th series, 1960), pp. 62-66.

⁵ *Ibid.*, pp. 65-66.

⁶ Moreover, in the reverse case, where a person domiciled abroad applies for a provisional adoption order in respect of an English child, the conditions essential

Can a child
adopted
abroad
benefit
under
an English
will or
intestacy?

Foreign adoptions. A question of considerable social importance, to which the English courts have so far given no definite answer, is the extent, if any, to which an adoption accomplished abroad according to the personal law of the parties will be recognized as effective. Before considering the relevant authorities it is proposed to consider the matter on principle.

The following hypothetical facts raise the problem in its simplest form.

X, a woman, adopts an infant, *Y*, in the country where they are both domiciled. Later, a testator, who dies domiciled in England, bequeaths legacies to the 'children' of *X*. Can her adopted child, *Y*, take under this bequest?

There would be no doubt of the answer if *Y* had been the illegitimate child of *X*, but by reason of the subsequent marriage of his parents had been legitimated according to the law of the country where at the time of his birth and of the marriage his father was domiciled. In such a case, as we have seen, *Y* would be qualified at common law to take the bequest as being the legitimate child of *X*.¹

Question
whether
adoption is
in pari
materia
with legi-
timation

The crucial and decisive inquiry, therefore, is whether in the present context legitimation and adoption are to be equated. Is an analogy with such cases as *In re Goodman's Trusts*¹ sensible? It is submitted that an affirmative answer can scarcely be avoided. There are, indeed, obvious differences between adoption and legitimation. Thus, in legitimation a blood tie is essential, in adoption it is not. Yet, both in England and in other countries, an adopted person becomes the lawfully recognized child of his adopters and is in substantially the same position as if he were their natural child. Though he may be and may continue to be illegitimate, his status as a child is no longer disturbed by any of the disabilities that attach to illegitimacy.² Is it not, therefore, splitting hairs to say that, since adoption is not technically a recognized form of legitimation, all reference to the legitimation authorities must be excluded?³ Of course, in rare cases it may be difficult to ascertain whether the infant party to a foreign adoption becomes a child of the

for an English adoption order must be observed and the court must be satisfied that the applicant intends to adopt the infant under the law of or within the country in which he is domiciled; Adoption Act, 1958, s. 53.

¹ *Supra*, p. 428.

² *In re D., an Infant*, [1959] 1 Q.B. 229, 236 per Denning L.J.

³ This view is taken by Unger, 43 *Transactions of the Grotius Society*, 104.

adopter in the generally accepted sense of the term, but as Harman J. observed, this 'does not prevent the law of the domicile prevailing in cases of legitimation by other means, and should not do so, in my view, in cases of adoption which is a kind of legitimation'.¹ The genius and expansion of the common law would indeed wither away if the traditional practice were to be abandoned of applying the principles already established for one type of case to another type substantially similar in nature.

If, then, it is permissible to invoke the English authorities concerned with legitimation by subsequent marriage, the answer to our hypothetical problem is clear. The existence of Z's status as fixed by the law of the domicile common to him and his adopter must on principle be recognized in England. He is the child of X in the eyes of English law. This, however, does not conclude the question of his right to take the legacy under the English will, for it is trite learning that the recognition of a foreign status does not necessarily involve recognition of its consequences or incidents as fixed by the foreign law, including the capacities and incapacities of the person affected.² In a case of succession such as that now under review, the English *lex successionis* prescribes that no person has the capacity *qua* child to take a bequest under an English will unless he is legitimate. But English law having thus laid down the general rule upon a matter that falls within its exclusive control, then stands down, and the question whether the propositus is in fact legitimate is left to the arbitrament of the foreign *lex domicilii*. As we have seen, English law is content to recognize a foreign legitimation for testamentary purposes, even though it may not comply with the domestic law of England.

It is finally submitted that this doctrine of recognition, which is based upon the distinction between status and its consequences, is not confined to foreign legitimations but extends equally to foreign adoptions effected in the common domicile of the parties, for, as one learned writer has said, it represents 'a broad general principle applicable to all cases in which the question of succession and the question of status

Importance
of the
distinction
between
status and
its incidents

Submitted
that the
legitima-
tion
authorities
are
relevant

¹ *In re Marshall*, [1957] Ch. 263, 274.

² See, for example, 46 *L.Q.R.* 293 (Sir Carleton Allen); 6 *I. & C.L.Q.* 220-4 (B. D. Inglis); Dicey, pp. 223 et seqq. Falconbridge, *Conflict of Laws* (2nd ed.), pp. 120, 751 et seqq.; Graveson, *Conflict of Laws* (4th ed.), pp. 112-13.

are involved'.¹ It is further submitted that on the analogy of *Armitage v. A.-G.*² it also applies to a case where the adoption, though not accomplished in the common domicil of the parties, is nevertheless recognized as effective by the law of that domicil.

Problem
where
adopter and
infant have
different
domicils

A more difficult problem arises where the parties have no common domicil. Will, for instance, the English court recognize an adoption in France, where the adopter is domiciled, of an infant domiciled in Italy? Is it sufficient that one of these laws should be satisfied, and if so which? Or, must both be satisfied?³ There is no agreement upon the question among foreign legal systems. In some the personal law of the infant governs, in others the personal law of the adopter is preferred, but in many the doctrine of cumulation prevails by which the personal law of both parties must be satisfied.⁴ There is no doubt that at any rate in principle the last solution is correct. Adoption changes the status of both parties, and therefore to attract extra-territorial recognition it must be valid according to each *lex domicilii*.

The pre-
sent state
of English
law

When we turn from principle to practice we find that the judges have not been impressed by the suggestion that for the purposes of succession under an English will or intestacy adoption is in *pari materia* with legitimation. In fact, the present view seems to be that for this purpose no adoption will be recognized unless it has been effected under the English statute. There are only two decisions to be considered.⁵

In re Wilby

The first of these is *In re Wilby*⁶ where the facts were as follows:

1956.

Back:

Mr. & Mrs. A adopted X according to the law of Burma at a time when all three parties were domiciled in that country. The parties subsequently acquired an English domicil and X died intestate, whereupon Mrs. A (her husband having died), applied for letters of administration as being the mother of X.

Barnard J. held, however, that she was not entitled to succeed to the intestate child's estate. The learned judge, though

¹ B. D. Inglis, 6 *I. & C.L.Q.* 203. The whole of this article merits close attention.

² [1906] P. 135, *supra*, p. 394.

³ See the discussion by Kahn-Freund, *The Growth of Internationalism in English Private International Law*, pp. 82-88.

⁴ 57 *L.Q.R.* 123; Wolff, p. 398; 5 *I. & C.L.Q.* 209-10.

⁵ *In re Wilson*, [1954] Ch. 733 is not relevant, since the adoption was in Quebec where the adopter was not domiciled.

⁶ [1956] P. 174; 5 *I. & C.L.Q.* 210-13.

agreeing that the adoption would be recognized for certain purposes, denied that it could be recognized for the purposes of that section of the Adoption Act which provides that where at any time after the making of an adoption order, the adopter or the adopted person dies intestate, his property shall devolve as if the adopted person were the child of the adopter.¹ It is respectfully submitted, however, that the English statute deals solely with adoptions in this country and that it is wholly irrelevant to a foreign adoption. The respective roles of the law of the domicil and of the *lex successionis* must not be distorted. If the Burmese law conferred the status of parent upon Mrs. Wilby, then, as a learned writer has said, it is difficult to appreciate why she was not the lawful mother of the deceased within the meaning of the English Statutes governing intestacy.²

(ii) 1959. The other decision to be considered is *In re Marshall*.³ *In re Marshall*

A testator, domiciled in England, left capital to his widow for life, with remainder to certain named cousins. He directed that if any of the cousins predeceased the widow leaving 'issue', then such issue should take the shares of the deceased cousins. One of the cousins, C. S. J., predeceased the widow. C. S. J. and his wife, while domiciled in British Columbia, had adopted an infant. As it stood at the time of the testator's death, which was the critical time for deciding whether a person had capacity to take a bequest, the law of British Columbia conferred upon the parties to an adoption the status of parent and child with all the rights and obligations that this implies, except that for the purposes of inheritance and succession it was only in the case of a will made by the adopter himself that the word 'child' was to include an adopted child.

In the court of first instance, Harman J., differing in this respect from the view of Barnard J. in *In re Wilby*, expressed his readiness to recognize for the purposes of an English will adoptions effected in the law of the domicil, but on the facts before him he felt unable to allow the claim of the infant, since the *lex domicilii* expressly provided that the word child should include an adopted child only in the case of a will or other instrument executed by the adopter. The Court of Appeal accepted this reasoning and affirmed the decision.

'It seems to us', said Romer J., delivering the judgment of the court, 'that only those who are placed by adoption in a position, both as

¹ Adoption Act, 1950, s. 13 (1); Adoption Act 1958, s. 16 (1).

² B. D. Inglis, 6 *I. & C.L.Q.* 219.

³ [1957] Ch. 263, aff. p. 507. See 34 *B.Y.B.I.L.* 403 (P. B. Carter); 6 *I. & C.L.Q.* 695 (Gareth H. Jones); 20 *M.L.R.* 405 and 643 (P. R. H. Webb).

regards property rights and succession, equivalent, or at all events substantially equivalent to that of the natural children of the adopter can be treated as being within the scope of the testator's intention.'¹

The
decision
criticized

It is respectfully suggested that this is to pervert and enlarge the function of the *lex domicilii*. That function, in such a case as the present, is to determine whether the legatee possesses the status of a child, not to determine whether his right of benefiting from an English will or intestacy shall be limited or unlimited. A simple analogy is provided by the status of marriage. If *H* and *W* were domiciled in country *X* where they were married, but domiciled in England when the husband died intestate, English law, though bound to recognize the married status conferred upon *W* by the law of *X*, would ignore any limitation placed by that law upon her right to succeed to her husband's estate. So also with adoption. As the Supreme Court of New Hampshire said in a leading case:

'No logical reason has been advanced and none occurs to us, why the right of a married woman in her husband's personalty should be determined in accordance with the laws of his last domicil, and the rights of an adopted child in relation to personalty by the laws where the adoption occurred, regardless of the domicil of the owner at the time of his death.'²

¹ [1957], Ch. at p. 523.

² *Anderson v. French* (1915), 77 N.H. 509; Cheetham, *Cases & Materials on Conflict of Laws* (3rd ed.), p. 784. Such is the rule in most of the States in the U.S.A. 'If the law of the state of adoption there is a limitation upon inheritance by adopted children, such limitation does not, by the better rule, apply to inheritance in a state having no such limitation. But a limitation upon inheritance by a state governing the inheritance in the particular case is applicable, regardless of the law of the state of adoption.' Goodrich, *The Conflict of Laws* (3rd ed.), p. 449.

CHAPTER XIII

INFANCY AND MENTAL DISORDER

1. Infancy. *Pages 447-52.*
2. Mental Disorder. *Pages 453-7.*

I INFANCY

It is advisable to state in summary form the internal law of England that regulates the tenure of office and the rights and duties of a guardian in a purely domestic case where the infant is domiciled in this country. A guardian, whether he is the parent or a person expressly appointed to the position, is entitled freely to exercise all the powers recognized by English law as appertaining to his office until his authority or his acts are challenged in the courts. His chief personal rights are to retain the custody, to control the education and to forbid the marriage of his ward. His proprietary rights are less defined. A parent as such has no right to the child's property, but it was recognized before 1926 that a testamentary guardian was entitled to manage the real and personal property of the ward and to give valid receipts for legacies and other sums of money, subject, of course, to a strict duty to account for all property that came into his hands. The exact extent of these rights, however, is no longer of great importance, for the general result of the Property Acts which came into force on 1 January 1926, and which apply where the ward is domiciled in England, is to vest the property of infants in trustees or personal representatives, who are given comprehensive powers of management and control over it, including the right to apply income for the benefit of the infants.

Position of
guardian
under
English
internal
law

The English courts possess a parental and administrative jurisdiction over children which may be invoked either by or against a guardian. If the conduct of the guardian is impugned, he may be removed from his office; if, on the other hand, he has been interfered with in the exercise of his discretion, he may obtain an order from the court that will render his wishes effective. A particular example of this latter proceeding and one that affects private international law occurs where a ward is removed from England without the consent of the guardian.¹

Jurisdic-
tion of
English
courts over
infants

¹ *Hope v. Hope* (1854), 4 De G.M. & G. 328.

In one case¹ the wife of a man resident and domiciled in England took the infant children of the marriage to the United States and kept them there against the wishes of her husband. The children were then made wards of court² and an injunction was granted at the instance of the husband to restrain the wife from keeping them out of England. The issues that arose upon an appeal from this order were succinctly disposed of by Romer L.J. in the following words:

'It is plain that this court has jurisdiction to order a person in this country to perform an act abroad; but it is said that this court has no jurisdiction to make an order requiring a person resident abroad to do an act there. Notwithstanding the strenuous argument of Mr. Archer it appears to me that his proposition is wholly untenable. The moment a person is properly served under the provisions of Order XI³ that person, so far as the jurisdiction of this court is concerned, is precisely in the same position as a person who is in this country. It is said, however, that even if there was jurisdiction to make the order appealed from it should not have been made as it is not for the benefit of the children. I agree that the benefit of the children is the first consideration of the court. In my opinion the children of British parents who are wards of court should not, in the absence of special circumstances, be permanently resident abroad, and it is plainly right and for the benefit of the children in the present case that they should be brought to this country. Even so it has been contended that this order can never be enforced against Mrs. Liddell if she chooses to disobey it. . . . It is not the habit of this court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed.'

Jurisdiction of English court to appoint guardian

(i) Jurisdiction of the Court to appoint a guardian. An infant present in England is within the Queen's allegiance. He is entitled to the special protection owed by the Queen as *parens patriae* to infants and entitled to the protection of the royal courts. The English court, therefore, possesses jurisdiction to appoint a guardian or to make an order as to custody, not only where the infant is a British subject⁴ but also where, though an alien, he is domiciled or merely resident in England.⁵ Thus an infant German, whose parents were believed to be in an Italian concentration camp, was brought to this country and placed

¹ *In re Liddell's Settlement Trusts*, [1936] Ch. 365.

² As to the necessity of this, see *In re E. (An infant)*, [1956] Ch. 23.

³ *Supra*, pp. 111 et seqq.

⁴ *In re Willoughby* (1885), L.R. 30 Ch.D. 324; *Hope v. Hope* (1854), 4 De G.M. & G. 328. *Harben v. Harben*, [1957] 1 W.L.R. 261.

⁵ *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *In re D.*, [1943] Ch. 305. Cp. *In re O'Brien*, [1938] I.R. 323.

in a hostel. Upon proof that he had been removed from there and was detained by certain relatives, the court ordered that he be placed under the care of a guardian.¹ The fact that an infant possesses property in England does not by itself render the court competent.²

The exercise of the jurisdiction may be complicated by the fact that a guardian has already been appointed in the country of the domicile and that he, relying upon the principle which submits all questions of status to the *lex domicilii*, claims that the custody of the infant should be given to him. But, as we have seen more than once, the recognition of a particular foreign status does not necessarily mean that effect will be given to all its incidents. The essential fact to appreciate in the present context is that, whether an appointment has already been made in another country or not, the promotion of the welfare of the infant is the paramount consideration to which everything else yields.³ 'There is but one object which ought to be kept strictly in view and that is the interest of the infant.'⁴ The manner in which the jurisdiction should be exercised lies within the discretion of the judge, and before reaching a decision he should weigh every circumstance that can possibly be regarded as bearing upon the well-being of the infant. It follows that his decision should not lightly be disturbed unless he has clearly acted on some wrong principle or has disregarded material evidence, for he has the advantage, generally denied to an appellate court, of seeing the parties and hearing the cross-examination of the witnesses.⁵ The latitude of his discretion is well illustrated by *McKee v. McKee*.⁶

Principle
upon which
jurisdiction
exercised

(U) ✓ Husband and wife, American citizens, separated and agreed in writing that neither of them, without the permission of the other, would remove their infant son out of the U.S.A. A year later the husband obtained a decree of divorce from a Californian court and an order awarding him the custody of the infant and confirming the written agreement. Subsequently, the same court, on the applications of both parties, awarded custody to the wife. About five years later the husband took his son to Ontario without the leave or knowledge of his wife. The wife thereupon took *habeas corpus* proceedings in Ontario. The trial judge, after a careful review of the circumstances, awarded custody of

¹ *In re D.*, [1943] Ch. 305.

² *Brown v. Collins* (1883), 25 Ch.D. 56.

³ *McKee v. McKee*, [1951] 1 All E.R. 942, 948. This is specifically enacted by the Guardianship of Infants Act, 1925, s. 1.

⁴ *Stuart v. Bute* (1861), 9 H.L.C. 440, at p. 469, *per* Lord Cranworth.

⁵ *McKee v. McKee*, *supra*, at p. 945.

⁶ *Supra*.

the infant to the husband, but his decision was reversed by the Supreme Court of Canada.

The Privy Council restored the Ontarian decision. The two charges levelled against the husband, that he had broken the agreement with his wife and had flouted the order of the Californian court, had been adequately considered by the trial judge, and in the opinion of the Board he was justified in concluding that in the light of the other circumstances the interests of the infant would best be served by leaving his custody with the husband undisturbed. The order of the Californian court was a factor of great importance, but it was not decisive.

'Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This distinction, which has long been recognized in the courts of England and Scotland,¹ rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final.'²

Having regard to the wide discretion left to the judge, it is not unnatural that the emphasis given to foreign orders and to the claims of the foreign *lex domicilii* has varied considerably in the cases. With *McKee v. McKee* may be ranged *Johnstone v. Beattie*,³ *In re B's Settlement*,⁴ and *Wakeham v. Wakeham*,⁵ in each of which the court showed a somewhat startling tendency to doubt the wisdom of what had been ordered in the domicile. On the other hand, more respect was shown to the views of the domicile in *Di Savini v. Lousada*,⁶ *Nugent v. Vetzera*,⁷ and *Monaco v. Monaco*.⁸ *Nugent v. Vetzera* may be contrasted with *McKee v. McKee*.

Nugent v. Vetzera ✓ An Austrian subject, having married an Englishwoman, died in Turkey leaving ten children who were all minors by Austrian law. (i) Their mother having died, one Vetzera was appointed guardian by the Austrian court with a direction that the children should be brought up in the religion of their father, and should be sent as soon as possible to Vienna in order to receive their education in that city. In 1865 five of the children were being educated at various schools in England, and Vetzera decided that three of these should be forthwith removed to

¹ *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *Stuart v. Bute* (1861), 9 H.L.C. 440.

² *McKee v. McKee*, [1951] A.C. 352, 365; [1951] 1 All E.R. 942, 948.

³ *Supra*.

⁵ [1954] 1 W.L.R. 366.

⁷ (1866), L.R. 2 Eq. 704.

⁴ [1940] Ch. 54.

⁶ (1870) 18 W.R. 425.

⁸ (1937), 157 L.T. 231.

Vienna. Their eldest sister, who had married an Englishman, being opposed to the plan, made the children wards of court and obtained an order by which she and two other English persons were appointed guardians. Vetzera appealed against this order and moved that the guardians be ordered to deliver the infants into his custody.

Opposition to the motion was based on the principle that the court must always be solely guided by what is most beneficial to the infants.

‘As to completing their education at Vienna,’ said counsel, ‘what possible benefit can result by removing them from this country, where all their friends and connexions are, and where they are being brought up under the care of a married sister, who, from her position in society, is able to give them the best possible education and associations, and sending them to a city where, even if a good education can be obtained, they have not a single relation or friend? We do not wish to remove Vetzera from his guardianship, nor do we suggest a single word against him. All we say is that he is not an English guardian, and is unable, from his position, to bring these children up in accordance with the course of education that they have hitherto enjoyed.’

This argument, however, found no favour with Page-Wood V.-C. That learned judge refused even to consider the question whether the interests of the infants would be better served by an English or by an Austrian education.¹ While observing that he was not propounding any abdication of his right to appoint guardians, he conceived that he had no right to interfere with the discretion of the guardian appointed by the foreign court, and he made an order giving Vetzera the exclusive right to the custody and control of the children. At the same time he refused to discharge the order appointing English guardians, on the ground that the children, if present at any time in England, might require the protection of persons within the jurisdiction.

(ii) Foreign guardians not confirmed by the English court. If a foreign guardian has not been confirmed in his office by the English court the question arises whether he is entitled to exercise in England those rights over the person and property of his ward that are recognized by English internal law. It is clear in the first place that, whether confirmed or not, his powers are limited to those recognized by English internal law.² This rule is in sharp contrast with the practice adopted on the Continent, where it is admitted in general that a tutor

Authority
of foreign
guardian
governed
by English
law

¹ His attitude would presumably have been different had the infants been British subjects; *Dawson v. Jay* (1854), 3 De G.M. & G. 764.

² *Johnstone v. Beattie* (1843), 10 Cl. & F. 43, 114.

appointed under the personal law of the infant enjoys the same rights over his ward's movable property in other countries as he possesses in the country of his appointment. The problem is, then, whether a foreign guardian is justified if he acts in England within the limits of English internal law. The answer would appear to be that nowadays he occupies in effect the same position as an English guardian. What he does within the limits of English internal law will be recognized as validly done provided that his authority has not been challenged; but if his position or his authority is challenged, then, as in the case of an English guardian, it lies within the discretion of the court whether he shall be replaced by another person or whether his acts or proposed acts shall be approved. Perhaps the only difference in this respect between a foreign and an English guardian is that the court would be more ready to displace the former than the latter.

Authority
of foreign
guardian
over ward's
property

The cases already discussed show that whether the foreign guardian shall be allowed to exert his personal authority, as, for example, by removing the ward from England, is conditioned solely by what the court considers is most calculated to promote the welfare of the infant. The position is the same with regard to proprietary rights. English practice has shown a tendency to recognize the right of a foreign guardian to claim movable property in England.¹ Again, however, if his right is challenged it is at the discretion of the court whether, having regard to the interests of the ward, the property shall be delivered to the guardian or to some other person.² The question generally arises where money is due to a foreign infant under an English settlement, will or intestacy. Where the money has not been paid into court, it has been said that the trustees are legally discharged if they make payment to the foreign guardian and take his receipt.³ Where the money is in court, then the court is entitled, but not compelled, to order payment to the guardian, and whether it does so or not depends upon whether it is satisfied that the property will be properly administered for the infant's benefit.

¹ *Mackie v. Darling* (1871), L.R. 12 Eq. 319; *In re Crichton's Trust* (1855), 24 L.T. (O.S.) 267; *In re Browne's Trust* (1865), 12 L.T. 488.

² *In re Chatard's Settlement*, [1899] 1 Ch. 712; *Ex parte Watkins* (1752), 2 Ves. Sen. 470; *In re Hellmann's Will* (1866), L.R. 2 Eq. 363. Cp. *Dharamal v. Holmpatrick*, [1935] I.R. 760: A, domiciled in Indore, not entitled as of right to Irish Sweep winnings of his daughter, aged 7, though by Indore law he could give a good discharge.

³ *In re Chatard's Settlement*, *supra*, at p. 716, Kekewich J.

(II) MENTAL DISORDER

The rules of English internal law relating to lunacy, which were not undeservedly described as a jungle, have now been reduced to a simple code by the Mental Health Act, 1959. This Act has radically changed the old law in many respects. The Lunacy and Mental Treatment Acts, 1890 to 1930, and the Mental Deficiency Acts, 1913 to 1938, are repealed. The former practice under which a person was certified to be of unsound mind and detained in hospital is now obsolete, as is also the procedure under which, after a formal inquiry ('inquisition'), a patient could be declared to be of unsound mind ('lunatic so found') and a person be appointed (the 'committee') to whom the management of the patient's property or person was committed. Moreover, there are no longer different categories of patients, but only one, namely, a person who is suffering from 'mental disorder' as defined by the Act.¹ The jurisdiction relating to a patient is now purely statutory and is entrusted to three judges of the Chancery Division, styled 'nominated judges',² whose functions are also exercisable by the Master and Deputy Master of the Court of Protection.³

As regards private international law, the subject may be conveniently classified under the three headings of control of the patient personally, the control of his property, and his rights and obligations in contracts.

(i) Control of the person of the patient. The law applicable to the physical control of the patient must clearly be the law of the place where he happens to be. So far as English law is concerned, the provisions under which a patient may be compulsorily admitted to hospital and detained there, or placed under guardianship, are to be found in Part IV of the Mental Health Act, 1959, which applies to a patient for the time being in England whatever may be his nationality or domicile.

With regard to the powers of a foreign curator, it is clear that he can exercise no control in this country over the patient personally.⁴ If he wishes to procure the removal of the patient

¹ Mental Health Act, 1959, s. 4.

² The inherent jurisdiction, derived from the royal prerogative and exercisable only by those to whom it has been entrusted by mandate under the Sign Manual, though not abolished, is defunct, since no further mandate is to be issued; 23 *M.L.R.* 423 (Raymond Jennings).

³ This is not in fact a court, but an office of the Supreme Court. In practice, however, it exercises the jurisdiction entrusted to the Chancery judges, so far as questions of management and administration are concerned; *ibid.*

⁴ *In re Houston* (1826), 1 Russ. 312.

out of the realm, and the patient is receiving treatment for mental illness as an in-patient in a hospital, application should be made to the Secretary of State for a warrant authorizing the removal of the patient.¹ Provision is also made for the removal of patients to Scotland and Northern Ireland, either on the authority of the Minister of Health or of the Secretary of State.²

(ii) *Control of a patient's property.* The management of the property and affairs of a person who is, by reason of mental disorder, incapable of managing them himself is, by the law of England, committed to the Lord Chancellor and certain judges of the Supreme Court nominated by him and to the Master and other officers of the Court of Protection.³ The usual method of exercising this management is by the appointment of a receiver, who is invested with certain powers of dealing with the property of the patient and whose authority is restricted to the exercise of the particular powers so given.⁴

Jurisdiction of Court of Protection The jurisdiction of the Court of Protection⁵ extends to any person incapable by reason of mental disorder of managing his affairs who is actually present in England, whatever his nationality or domicile and even though his property is, except for a few personal belongings, all situate abroad.⁶ The jurisdiction likewise extends to any such person, whatever his nationality or domicile, who is outside the realm, provided he has property in England.⁷ British nationality or domicile would not of itself appear to justify an exercise of the jurisdiction.

Limits upon the exercise of jurisdiction The exercise of the jurisdiction where a foreign element arises is, however, qualified in two ways. Firstly, the Court of Protection cannot make an order directly affecting property situated in a country where the authority of the Court is not recognized,⁸ but it achieves its object by directing the receiver to take such steps as may be necessary to effect the purposes of the Court, e.g. by appointing an attorney to act in the name of the patient in

¹ Mental Health Act, 1959, s. 90.

² *Ibid.*, ss. 81-83, 85, 86, 88.

³ *Ibid.*, Part VIII.

⁴ *Ibid.*, s. 105.

⁵ In this context, the expression 'Court of Protection' includes also the Lord Chancellor and the 'nominated judges'.

⁶ *In re Houston* (1826), 1 Russ. 312; *In re Bariatsinski* (1843), 1 Ph. 375; *In re Burbidge*, [1902] 1 Ch. 426.

⁷ *Ex p. Southcote* (1751), 2 Ves. Sen. 401; *In re Scott* (1874), 22 W.R. 748.

⁸ By s. 117 of the Mental Health Act, 1959, provision is made for the reciprocal recognition of orders made in England, Scotland, and Northern Ireland (other than orders relating to land) provided a receiver or a person holding an equivalent office has not been appointed in the country in which the order is to be enforced.

selling property and accounting to the receiver for the proceeds. Secondly, the Court acts in accordance with the comity of nations and refrains from making orders which would be regarded as an infringement of a foreign jurisdiction.

With regard to the powers of a foreign curator over property in England, it must first be observed that he has no such power over immovables¹ or over movables or immovables if a receiver has been appointed in England.² Subject to this, the rule has now become established that a foreign curator is entitled to demand, and to give valid receipts for, property belonging to the patient which is held by persons in England.³ This principle was finally laid down by the Court of Appeal in the leading case of *Didisheim v. London & Westminster Bank*,⁴ where the facts were as follows:

Powers of
foreign
curator
over prop-
erty in
England

1900.

Facts: A lady, domiciled and resident in Belgium, had securities of great value deposited with the defendant Bank in London. She became insane in fact, though without being so found judicially, and Didisheim was appointed her provisional administrator by the Belgian court. Didisheim, having applied to the Bank without success for the securities, brought an action for their recovery.

North J. gave judgment for the defendants on the ground that, though there were many cases in which the courts had so far recognized the status of a foreign guardian as to order the delivery of English property to him, yet this was only possible on the authorities⁵ where the lunatic had been so found abroad and where his property had been vested in the curator by the foreign court. The Court of Appeal, however, in reversing this decision, held that *Didisheim* was entitled to call for the securities and to give the bank a good discharge.

‘On general principles of private international law, the courts of this country are bound to recognize the authority conferred on him by the Belgian courts, unless lunacy proceedings in this country prevent them from doing so.’⁶

The court, however, ordered Didisheim to pay all the costs of the action, since the Bank was justified in not complying with

¹ *Grimwood v. Bartels* (1877), 46 L.J.Ch. 788.

² *In re R.S.A.*, [1901] 2 K.B. 33.

³ *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiery v. Chalmers Guthrie & Co.*, [1900] 1 Ch. 80; *In re De Linden*, [1897] 1 Ch. 453; *Scott v. Bentley* (1855), 1 K. & J. 281.

⁴ [1900] 2 Ch. 15.

⁵ *In re Barlow's Will* (1887), 36 Ch.D. 287.

⁶ *Didisheim v. London & Westminster Bank*, *supra*, at p. 51.

his demands until he had established his title by a successful action in the High Court. At the present day, however, an English debtor in like circumstances is not justified in insisting upon the protection of an order of the court. *Didisheim's Case* has definitely established the right of a foreign curator to demand property. If, therefore, an English debtor forces an action, he acts with an unreasonable excess of caution and will have to pay his own costs.¹

One limitation on the decision in *Didisheim's Case* must be noticed. The owner of the property was an alien domiciled abroad over whom the court had no jurisdiction personally. The same duty to recognize the status of the foreign curator, therefore, does not arise where the patient is an Englishman temporarily abroad.²

Although the principle established by *Didisheim's Case* is of great benefit to foreign curators, its usefulness is limited not only by the fact that it has no application to immovable property but because it does not enable the foreign curator to reduce into possession stock and shares registered in the names of the patient. The reason for this is that stock and shares can only be transferred by an instrument of transfer executed by the registered holder or by a person having authority to execute the document on his behalf, and a foreign curator is not recognized as having this power. It is not, however, necessary in every case where stock and shares are concerned to appoint a receiver in England or to have independent medical evidence of mental incapacity, for the Court of Protection is empowered, if satisfied that the foreign curator has been appointed on the ground that the patient is incapable by reason of mental disorder of managing his property, to direct any stock or shares standing in the names of the patient to be transferred to the curator or otherwise dealt with as he may direct.³ The power is discretionary, and the Court will not direct the capital to be transferred unless satisfied that it is required for the patient's maintenance or that there is other sufficient reason justifying a transfer.⁴

Semle the proper law governs (ii) Rights and obligations in contract. The problem of choice of law that arises where a contract containing a foreign element

¹ *Pélégri v. Coutts & Co.*, [1915] 1 Ch. 696.

² *In re Garnier* (1872), L.R. 13 Eq. 532; *New York Security Co. v. Keyser*, [1901] 1 Ch. 666.

³ Mental Health Act, 1959, s. 106; replacing Lunacy Act, 1890, s. 131.

⁴ *Re Knight*, [1898] 1 Ch. 257; *Re Larragoiti*, [1907] 2 Ch. 14.

has been made by a person alleged to have been mentally defective at the time of its making, seems never to have been canvassed either by the judges or by jurists. If one of the parties to a contract was domiciled abroad and was in fact insane at the time, is the legal effect of his insanity to be governed by his *lex domicilii* as being his personal law? In a commercial transaction such as a contract, it would seem that domicil is not the appropriate connecting factor, and it is submitted that the question falls to be governed by the proper law of the contract. objectively ascertained. ✓.

PART V

THE LAW OF PROPERTY

CHAPTER XIV. THE DISTINCTION BETWEEN
MOVABLES AND IMMOVABLES

CHAPTER XV. THE LAW OF MOVABLES

CHAPTER XVI. THE LAW OF IMMOVABLES

CHAPTER XIV

THE DISTINCTION BETWEEN MOVABLES AND IMMOVABLES

ENGLISH private international law, in order to arrive at a common basis upon which to determine questions involving a foreign element, classifies the subject-matter of ownership into movables and immovables, and thus adopts a distinction that is accepted in other legal systems.¹ The first task of the court in a conflict of laws case when required to decide some question of a proprietary or possessory nature is to decide whether the *res litigiosa* is a movable or an immovable. Upon this preliminary decision depends the legal system that will be applicable to the case. Rights over immovables are determined by the *lex situs*; rights over movables are not necessarily governed by that law. In the sphere of private international law, then, the Anglo-Saxon distinction between realty and personalty is abandoned, even though the case concerns a country in the British Commonwealth where it is recognized in the sphere of domestic law. The importance of not confusing the domestic distinction between realty and personalty with the private international law distinction between movables and immovables can scarcely be exaggerated. The one is not *in pari materia* with the other. The one cuts across the other in the sense that personalty includes both movables and immovables. Thus 'realty' is not synonymous either with 'land' or with 'immovables', for though a life tenant, for instance, holds an interest in realty, a leaseholder holds an interest in personalty. For the purpose of private international law, however, a lease creates an interest in an immovable and is subject to the *lex situs*.³

The question whether the subject-matter of ownership is a movable or an immovable generally presents no difficulty. It is common ground that interests in land, whether classified according to their nature, such as legal estates and equitable interests; or limited in duration, such as fees simple, entails and terms of years; or independent of the right to possession of the land, such as easements, profits and rentcharges, are

Subject-matter of ownership classified as movable or immovable not as realty or personalty

Lex situs decides whether subject-matter is movable or immovable

¹ *In re Hoyles*, [1911] 1 Ch. 179, at p. 185.

² *Freke v. Carbery* (1873), L.R. 16 Eq. 461.

interests in an immovable. A more complex problem arises in those cases where a right over what is physically a movable is regarded by a particular legal system as a right over an immovable. For instance, the owner of such obvious chattels as title-deeds, fixtures, fish in a pond and the key of a house is regarded by English internal law as having an interest in land. Again, it seems obvious at first sight that a building erected for the purposes of an exhibition, and which cannot be removed without losing its identity, must be in the same category as normal buildings, yet in some of the American States¹ and in Germany² its owner is deemed to hold an interest in a movable. If, therefore, the subject-matter of ownership is regarded as an immovable by one system of law but as a movable by another, to which law is the decision left? The answer given by English law and by most foreign legal systems is the *lex situs*. If the *lex situs* attributes the quality of movability or of immovability to the object in question, the English court which is seized of the matter must proceed on that basis.³

Immovables sometimes regarded as movables

'The question in all these cases', said Story, 'is not so much what are or ought to be deemed, *ex sua natura*, movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, . . . they must be so treated in every place in which any controversy shall arise respecting their nature and character.'⁴

Mortgages

Thus it has been held that the right vested in a mortgagee of English land must be regarded as an interest in an immovable, notwithstanding that it is classified by English domestic law as personalty and that the debt, not the charge, is the principal characteristic of the transaction.⁵

Scottish heritable bonds

The question whether a security granted in respect of land is to be regarded as conferring a right over an immovable or not, also occurs in the case of a Scottish heritable bond, i.e. a bond for a sum of money to which is joined, for the creditor's further security, a conveyance of land. The nature of such a bond falls to be determined by Scottish law as being the *lex situs*, and, where the personal undertaking and the conveyance are contained in the same instrument, the right of the creditor

¹ Cook, op. cit., pp. 306 et seqq.

² Wolff, op. cit., p. 502.

³ *Fohnstone v. Baker* (1817), 4 Madd. Rep. 474 n.; Westlake, s. 160, approved in *re Hoyles*, [1910] 2 Ch. at p. 341; [1911] 1 Ch. 179; Lainé, *Droit Int. Privé*, ii. 262; for U.S.A. see *Chapman v. Robertson*, 6 Paige (N.Y.) 630; Story, s. 447.

⁴ S. 447.

⁵ *In re Hoyles*, [1911] 1 Ch. 179.

has been held to be one over immovables.¹ This rule, however, has been partly abrogated by the Titles to Land Consolidation (Scotland) Act, 1868,² which provides that, so far as concerns *the right of succession to a creditor*, his heritable bonds shall be deemed to be part of his movable estate. Again, if a debt is secured to an English creditor both by a personal undertaking contained in a separate instrument and also by a heritable bond, the creditor is deemed to have a right in a movable, since the mere existence of the collateral security over the land does not alter the fact that the debt is a *chose in action*.³

The character of annuities and other periodical payments depends upon whether they issue out of, or are charged upon, land.⁴ An annuity in the strict sense represents a right to a movable, but a rent charged upon land is an interest in an immovable.⁵

A further and important illustration is afforded by *In re Berchtold*.⁶ This case turned upon the English doctrine of conversion, namely, that:

Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which their conversion is directed.⁷

What this equitable doctrine means in effect is that where there is such a direction the realty is treated as personalty for certain purposes, or in the reverse case that the personalty is treated as realty for certain purposes.⁸ If, for instance, land is conveyed to trustees upon trust for sale and to pay the proceeds to *A*, and *A* dies before the actual sale, a bequest by him of all his personalty will include the money eventually arising from the sale. This, of course, does not alter the fact that until sold the land is still an immovable. This becomes material if the beneficiary under the trust dies domiciled in a foreign country before the conversion has actually been effected. *In re Berchtold* is a case in point.

A died intestate, domiciled in Hungary, being entitled to a freehold

¹ *Johnstone v. Baker* (1817), Madd. 474 n.; *Jerningham v. Herbert* (1829), 4 Russ. 388; *Allen v. Anderson* (1846), 5 Hare 163.

² 31 & 32 Vict. c. 101, s. 117.

³ *Buccleuch v. Hoare* (1819), 4 Madd. 467.

⁴ Story, s. 447, n. 2.

⁵ *Chatfield v. Berchtold* (1872), L.R. 7 Ch. 192.

⁶ [1923] 1 Ch. 192.

⁷ *Fletcher v. Ashburner* (1779), 1 Bro. C.C. 497; Snell, *Equity* (22nd ed.), p. 194. Cp. the analogous French doctrine, 'convention de réalisation' and 'convention d'ameublissement', Burge IV, pt. i, pp. 698 et seqq.

⁸ Cook, op. cit., p. 256.

interest in English land which was subject to a trust for sale but which had not been sold. The English rule for the choice of law is that intestate succession is governed by the *lex situs* in the case of immovables, but by the *lex domicilii* in the case of movables. It was, therefore, vital to decide whether the freehold interest, despite the doctrine of conversion, was still to be regarded as an interest in an immovable.

It was argued with some plausibility that by reason of the trust for sale the land was already money in the eyes of equity, that money is a movable, and that therefore the devolution was governed by Hungarian law.

The fallacy of this argument was demonstrated by Russell J. The primary question before the court was whether the subject-matter in which the deceased was interested was immovable. This had nothing to do with a subsequent question that might arise under the doctrine of conversion, namely, whether realty was to be treated as personalty, or vice versa. It was held that the unsold land was an immovable, notwithstanding the binding direction for its conversion into money, and that therefore the proper law to govern its devolution on intestacy was the *lex situs*.

As an Irish judge said in a case where land in Ireland, subject to an existing trust for sale, had been disposed of by the will of a domiciled Scotsman:

'It is still immovable property in fact and the disposition of it is a disposition of immovable property and not of something else, namely, the money by which, if sold, it would be represented, but which before the sale does not in fact exist.'¹

In re Cutcliffe's Will These two decisions were distinguished by Morton J. in a later case where the distinction between realty and personalty, and therefore the doctrine of conversion, were not strictly relevant.²

English land which was subject to an English settlement had been sold under the Settled Land Act, 1882, and the proceeds had been invested in English debenture stock. The beneficiary under the settlement died intestate in 1897 domiciled in Ontario.

So far it seems obvious that the stock was in fact a movable and that therefore under the relevant doctrine of private international law its devolution was governed by the *lex domicilii* of

¹ *Murray v. Champenowne*, [1901] 2 I.R. 232.

² *In re Cutcliffe's Will Trusts*, [1940] Ch. 565.

the deceased. The Settled Land Act, 1882, however, provided that:

'Capital money arising under this Act while remaining uninvested and securities on which an investment of any such capital money shall be made, shall, for all purposes of disposition, transmission and devolution, be considered as land.'¹

In order to choose the governing law the primary question was whether the stock was a movable or an immovable. It was held that it was an immovable and subject as such to the English law of devolution. The decision has been attacked on the ground that the domestic doctrine of conversion was erroneously applied at the stage when the case was being considered internationally.² But this is to misinterpret the *ratio decidendi*. How could the decision have been otherwise? The stock was physically situated in England. English law, therefore, had to determine whether it was to be treated as a movable or an immovable. An English statute peremptorily demanded that for all purposes it should be regarded as land.

Of course, once the choice of law has been made, there may come a stage at which the distinction between realty and personalty becomes relevant. This occurs where the choice falls on a law that recognizes the distinction. The chosen law now has control of the case and it must be allowed to operate in its own way. In *Berchtold's Case*, for instance, the effect of deciding that the intestate died entitled to land was to let in English law as the *lex situs*, with the result that the land, being regarded as money under the domestic doctrine of conversion, devolved as personalty according to the rules of English internal law. Another example is afforded by the Wills Act, 1861, commonly called Lord Kingsdown's Act,³ which provides that the will of a British subject shall be formally valid as regards *personalty*, provided that it is valid according to the law of the country where it is made, although not valid by the law of the testator's domicile. This is an exception to the general rule that the *lex domicilii* of the testator governs the validity of a will of movables with regard to form. If, therefore, a British subject, domiciled in England, who is entitled to English land held on trust for sale but not yet sold, disposes of his interest by a will which is valid by the law of the country where it is made but invalid by

Stage at which distinction between realty and personalty is material

¹ S. 22 (5); see now Settled Land Act, 1925, s. 75 (5).

² By Falconbridge in 18 *Can. Bar. Review*, 568-73.

³ *Infra*, p. 564.

English law, the disposition is effective.¹ The subject-matter of his interest is no doubt immovable, but that does not affect the real question, which is whether it is personalty within the meaning of the English statute. Immovables subject to a trust for sale are deemed by English law to be money, i.e. personalty, so that they are caught by a statute which refers specifically to a disposition of personalty. The reverse position arose in another case:²

Settled freehold estates in English land had been sold under the Settled Land Act and part of the proceeds had been invested. Therefore under the Settled Land Act these investments were to be considered as land. The beneficiary in whom they had become vested, subject to certain charges, was a British subject who died domiciled in England. He disposed of them by a will which was formally valid by the *lex loci actus*, but invalid by English law.

If, therefore, the investments were to be regarded as personalty, the will was formally valid by virtue of Lord Kingsdown's Act, but if they were to be considered as land, the will was invalid, since it had not conformed to English law, the *lex situs*. The Court of Appeal had no hesitation in holding that investments which in the eye of the law were land could not be personalty for the purposes of Lord Kingsdown's Act.

The distinction between *choses in possession* and *choses in action*

The subject-matter of ownership, if not immovable, is properly divisible into *choses in possession*, i.e. tangible physical objects, and *choses in action*, such as debts, patents, copyright, goodwill, stock and shares. The classification of movables usually preferred, however, by private international lawyers is into tangible things and intangible things.³ This is not only a linguistic solecism, since it is scarcely possible to move a thing that cannot be touched, but it provokes an unfortunate tendency to ascribe to a disembodied thing, such as a debt, the physical attributes of a corporeal object as, for instance, a definite *situs*. Although Lord Halsbury once remarked that he was 'wholly unable to see that goodwill itself is susceptible of having any local situation',⁴ it is of course necessary for certain purposes, such as jurisdiction or probate, to assign a *situs* not

¹ *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

² *In re Cartwright*, [1939] Ch. 90.

³ For a criticism of the distinction see Cook, *Legal and Logical Bases of Conflict of Laws*, pp. 284 et seqq.

⁴ *Inland Revenue Commissioners v. Muller & Co's Margarine Ltd.*, [1901] A.C. 217, at p. 240.

only to goodwill, but to *choses in action* generally.¹ This is not without its dangers. Since the *situs* principle has furnished a simple and effective rule for questions relating to a physical thing, the natural inclination is to extend it to the abstract and to regard it as the general determinant of rules for the choice of law concerning *choses in action*. This is a false analogy. Moreover, it frequently leads to forcing a rule, eminently adapted to one set of circumstances, to fit circumstances for which it is entirely inappropriate. It is reasonably clear that the proper law to govern goodwill or a debt depends upon quite different considerations from those that are relevant to a physical thing. An English merchant, for instance, having sold goods on credit to a foreigner who has places of business in France, Switzerland and Italy, assigns the debt to a Dutchman. If the right of the assignee to sue the debtor is disputed, is the question to be governed by the *lex situs*? If so, what is the *situs*? The traditional answer, that it is the country where the debtor resides, is calculated to increase rather than to dispel uncertainty in commercial transactions. Obviously some different approach to the problem is required than that which has proved useful in another field. Although, therefore, the initiated no doubt know what they mean by their division of movables into tangible and intangible things, it seems to be more seemly and less harmful to adopt the distinction between *choses in possession* and *choses in action*.

¹ Goodwill is deemed to be situated in each country in which the business to which it is attached is carried on; *Reuter (R.F.) Co. Ltd. v. Muhlen*, [1950] Ch. 50, at p. 95, *per* Romer L.J.

CHAPTER XV

THE LAW OF MOVABLES

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(a) The various theories. *Pages 468-74.*

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A. PARTICULAR ASSIGNMENTS

I. TRANSFER OF *CHOSSES IN POSSESSION*¹

(a) *The various theories*

What law governs particular transfers of *choses in possession*?

OUR next task is to ascertain the legal system according to which the various problems that may arise from an assignment of movables must be determined. We are not concerned here with what are usually called general assignments, under which, on the occasion of marriage, death and bankruptcy, the entirety of a person's property may pass to another. Our inquiry is confined to particular assignments *inter vivos* of isolated or individual movables, of which the commonest examples are sales, gifts, mortgages and pledges. Further, the present discussion is limited to *choses in possession*.

This is perhaps the most intractable topic in English private international law, for the few relevant authorities are mostly antiquated and they do not reveal with any certainty what principles govern the subject as a whole. One common but

¹ On this subject see especially, Lalive, *The Transfer of Chattels in the Conflict of Laws*; Zaphiriou, *The Transfer of Chattels in Private International Law*; and Falconbridge, *Conflict of Laws* (2nd ed.), pp. 442 et seqq.

fallacious assumption is that all problems must be referred to one single law. In the course of time diverse views upon what this is have been advanced. The *lex situs*, the *lex domicilii* of the parties or of the transferor, the *lex loci actus*, the proper law of the transfer—each of these has had its advocates. The assumption, however, is untenable. It represents an oversimplification of the position, for it is based on the fallacy that the possible questions arising out of a transfer of movables all fall into the same category and are all of the same juridical nature. This is not so. Suppose, for instance, the following facts:

All questions not necessarily subject to one law

A, resident and domiciled in England, sells goods lying in a Barcelona warehouse to *B*, a Dutch merchant. He transmits the bill of exchange and the bill of lading to *B* to secure acceptance. *B* fails to accept the bill of exchange but takes the bill of lading to Antwerp and transfers it there to *C*, a Belgian merchant. Meanwhile, the goods have been shipped from Barcelona *en route* to Holland. The ship is wrecked off the coast of France, but the goods are salvaged and sold by the judicial authorities in Bordeaux to *D*.

A number of questions, some contractual others proprietary, differing fundamentally in character, may arise from these facts, and it does not require much acumen to appreciate that each one of these cannot satisfactorily be submitted to one system of law. Litigation may occur between *A* and *B* as to the formal or essential validity of the original transfer. *A* may claim as against *B* that he is entitled to stop the goods *in transitu*. *C* may interplead and claim a derivative title from *B* which he alleges renders stoppage unlawful. *D* may claim that the effect of the judicial sale in France has been to divest all previous owners, original as well as derivative, of their former titles. If it is true to say that questions arising out of the transfer and acquisition of property in corporeal movables are determinable by one single law, what is that law in the instant case? Is Spanish law, which happened to be the *lex situs* at the time of the original transfer, to determine *inter alia* the essential validity of the transaction between *A* and *B*, the effect of a failure by a Dutch buyer to accept a bill of exchange received by him from an English seller, and the title of a Frenchman who buys goods in France publicly sold by a French judicial authority? Further, the *lex situs* has not remained constant. Is it Spanish law for some questions, French law for others? If so, how are the questions to be classified for this purpose? If the *lex situs* is disenthroned as the one governing system and replaced by the

lex loci actus, or by the *lex actus*, i.e. the law with which the original transfer is most closely connected, or by the *lex domicilii* of any of the possible contestants, the mind recoils from the strange conclusions that might be reached by a court. Maugham J. once said *obiter*: 'I do not think that anybody can doubt that with regard to the transfer of goods the law applicable must be the law of the country where the movable is situate.'¹ It is submitted with respect that this rule, though undoubtedly correct in general, is not without its exceptions. The truth is that the search for the proper law to govern questions arising out of the transfer of corporeal movables will produce nothing but confusion and obscurity, unless certain elementary distinctions are made. Before suggesting how this should be done, it is proposed to consider the various theories that have been advanced.

Four
possible
systems

In choosing the proper law to govern the transfer of movable objects, arguments may be advanced in favour of the *lex domicilii*, the *lex situs*, the *lex loci actus*, or the proper law of the transfer. It will be well to consider the relative merits of these legal systems before attempting a final statement of the law.

(i) The *lex
domicilii*

Historically the starting-point is the maxim *mobilia sequuntur personam*, or, as it is stated in reference to debts, *mobilia ossibus inhaerent*. 'Personal property', some English writers have said, 'has no locality.' The earlier Continental authorities, taking their stand upon these maxims, affirmed with one accord that rights over movables were governed by the law of the owner's domicil.² It was said that movables must be considered in law to be situated in the domicil, for, since they might be moved from place to place at will, it was a matter of chance where they might happen to be at any given time. Dumoulin said that an artificial situation must be ascribed to movables since they had none that was fixed. Story justified the doctrine on the ground of 'its simplicity, its convenience, and its enlarged policy',³ and concluded with the statement that it had been 'constantly maintained both in England and America, with unbroken confidence and general unanimity'.⁴

The *lex
domicilii*
no longer
advocated

Although sweeping statements to the same effect may be

¹ *In re Anziani*, [1930] 1 Ch. 407, 420. See also *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, at p. 257, *per* Devlin J.: 'There is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually.'

² Bar, p. 488, note 1, where the authorities are collected; Story, s. 376.

³ S. 379.

⁴ S. 380.

found in the earlier English authorities,¹ it is now generally agreed that to allow either party to invoke his *lex domicilii* in the case of a dispute arising out of a transfer of chattels would be commercially impracticable and contrary both to natural justice and to the normal expectations of the parties themselves. It might, moreover, be prejudicial to innocent third parties, as can be seen from a hypothetical case.²

A, a domiciled Englishman, by a transaction which is valid by English law but void by the law of Illinois, executes a bill of sale in favour of *X*, another domiciled Englishman, over goods that are situated in Chicago, Illinois. Later, *Y*, also domiciled in England, causes a writ of attachment to be levied on the goods in Chicago in respect of a debt due to him from *A*. The attachment suit proceeds to judgment and the goods are sold in satisfaction of *Y*'s debt.

The result of holding in such a case that the original transaction conferred a valid and prior title to the goods upon *X*, since it conformed to the law of the common domicil of *A* and *X*, would be to impose liability in trover upon the sheriff and the officer who conducted the sale in Chicago. Yet it is obvious that though the sheriff must be presumed to know the law of the place where the goods are situate, he cannot be expected to investigate the *lex domicilii* of their owner.

Again, whose domicil is decisive? Suppose, for instance, that:

The question is whether goods stored in Antwerp belong to a domiciled Englishman or to a domiciled Frenchman.

In such a case no decision is possible on the basis of the *lex domicilii* if the laws of France and of England differ, for there is no guide as to which of these laws shall be chosen. If the *lex domicilii* of the plaintiff is chosen on the ground that the question of his title has been raised, there is a *petitio principii*, since the sole issue is whether he possesses a title.³ The result is the same if the *lex domicilii* of the defendant is chosen. Moreover, if the decisive factor is the domicil of one of the parties, the governing law would vary according to which of them began proceedings.⁴

¹ *Sill v. Worswick* (1791), 1 Bl. H. 665, 690, per Lord Loughborough; *In re Ewin* (1830), 1 Cr. & J. 151, 156 per Bayley B.

² Adapted from *Green v. Van Buskirk* (1886), 5 Wall. 307, in the Supreme Court of the United States; Lorenzen, p. 582.

³ Wharton, s. 308.

⁴ *Ibid.* Wolff suggests that the *lex domicilii* principle merely means that if *A* is the owner of a thing, a transfer by him must conform to the law of his domicil; *Private International Law*, p. 510, note 1.

Reason
why early
writers
favour *lex*
domicilii

The explanation of the adoption by the earlier writers and judges of what is an impracticable principle is that, finding it established as the governing rule for general assignments, they unthinkingly extended it to the quite different case of particular assignments. On the occasion, for instance, of marriage or death, two events which may cause a general transfer of proprietary rights, it is essential to have some one system of law, the matrimonial domicile in the first case and the domicile of the deceased in the second, which will regulate the disposition of the property; and, in fact, it has been said by the Privy Council that the maxim *mobilia sequuntur personam* means, not that movables are deemed to be situated where their owner is domiciled, but merely that their devolution on his death is governed by his personal law.¹ The *lex situs* is an impossible choice in such cases, for otherwise it might happen that 'a different law of inheritance or of matrimonial rights might apply to each single movable article that belonged to the estate'.² The older Continental jurists, in their insistence upon the pre-eminence of the personal law in relation to property, were generally dealing with the subject of inheritance, and it was but seldom that they considered assignments of isolated things.³

- (ii) The *lex situs* An alternative choice to the *lex domicilii* is the *lex situs*. This has obvious virtues. Where claimants have different domicils or where they rely upon transactions in different countries, the *lex situs* has the great advantage of being a single and exclusive system that can act as an independent arbiter of conflicting claims. Moreover, its right of control satisfies the expectations of the reasonable man, for a party to a transfer naturally concludes that the transaction will be subject to the law of the country in which the subject-matter is at present situated. If a movable which is vested in *A* as the result of a transaction with *B* governed by English law is taken by *B* to France and there sold to *C* in circumstances which, by French law but not by English law, confer a valid title on *C*, it would be a travesty of justice to determine the mutual rights of *A* and *C* by English law, the relevancy of which would be entirely unknown to *C*.

Nevertheless, it is going too far to say that every type of question must be submitted to the law of the *situs* and to that law alone. If, for example, goods deposited temporarily in a Naples warehouse are sold by their owner, a London merchant,

¹ *Alberta (Provincial Treasurer) v. Kerr*, [1933] A.C. 710, 721.

² *Bar*, pp. 489-90.

³ *Pillet*, i. 695.

to another London merchant by a contract effected in England, there seems no obvious reason why any question concerning the title to the goods should be governed by Italian law.

Again, as can be seen from the example suggested on page 469, cases may arise where the *situs* of the goods changes during the course of events leading to litigation. If this is so, the difficulty will be to identify the particular *lex situs* that must govern.¹

There is little to be said in favour of the *lex loci actus*. Here, as in other departments of law, the mere fact that a transaction is completed in a particular place is no adequate reason for admitting the control of the local law. If, for instance, an Englishman executes a document in Edinburgh granting a lien over his furniture in London to another Englishman, it is unthinkable that this slight and perhaps accidental connexion with Scotland should require the possessory rights of the parties to be determined by Scots law. Yet, curiously enough, there are at least two decisions, each, however, dealing with negotiable instruments, which contain strong dicta in favour of the *lex loci actus*. Thus in *Alcock v. Smith*, Romer J. said:

'Generally, the rights of transferor and transferee, on a transfer in one country of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in, a foreign country.'²

On appeal, Kay L.J. in terms said the same thing, but it seems clear from the illustrations he gives that he had in mind a case where the *lex loci actus* and the *lex situs* coincided. He said:

'As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place. Our own law of distress and market overt is illustrative of this. . . . The goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser.'³

Since the *locus actus* and the *locus situs* are necessarily the same in the transfer of a negotiable instrument, it is probable that in these cases the judges, despite their reference to the *lex loci actus*, were in fact speaking in terms of the *lex situs*.⁴

¹ 22 B.T.B.I.L. 233.

² [1892] 1 Ch. 238, 255.

³ Ibid., at p. 267. See also *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at pp. 683, 685.

⁴ Lalive, op. cit., p. 79.

(iv) The proper law of the transfer
 The last law that may be chosen to govern questions arising out of a transfer of movables is the law of the country with which the transfer has the most real connexion, or, more shortly, the *lex actus*, i.e. the proper law of the transfer, analogous to the proper law of a contract.

Its ascertainment will in most cases cause no difficulty, as for instance where the *lex loci actus* and the *lex situs* are identical or where two English business men meet in Paris and complete a transfer there of goods situated in England. But a more complex problem may arise, as where *A*, resident and domiciled in England, sells goods lying in a Naples warehouse to *B*, who is resident and domiciled in Holland. Without more facts it is scarcely possible to say what the *lex actus* would be in such a case. Before it could reach a decision, the court would require to know, *inter alia*: Where was the transfer effected? If reduced to writing, was it drafted in terms peculiar to English or Dutch law? Were the goods only temporarily in Italy? The danger, however, to avoid is the assumption that the *lex situs* always constitutes the proper law.

Choice lies between *lex situs* and *lex actus*, but neither invariably governs
 It would seem that of the four laws proposed the choice lies between the *lex situs* and the proper law of the transfer. Nevertheless, it cannot be said that either of them governs all cases to the exclusion of the other, or that where they clash there is one which invariably must be preferred. Which is the determinant depends upon whether the question to be decided arises between the parties to a particular transaction or between one of them and a third party. An attempt will now be made to state the modern law on the basis of this distinction.

(b) *The modern law*

1. *Questions confined to the parties to a particular transfer.*

Contractual and proprietary aspects of a transfer
 Questions arising between the parties themselves may include a variety of matters, such as whether the transfer is void for incapacity, whether it is formally or essentially void, whether it is voidable for misrepresentation or other cause, whether the property in the movables has passed to the transferee, whether the transferor has a lien on the goods or a right to stop them *in transitu*, and what is the nature of the interest created by the transfer. Some of these questions are of a contractual, others of a proprietary, character.

It is clear that the contractual rights and obligations of the parties themselves fall to be determined by the proper law of the transfer. This category includes such questions as whether there is an implied condition that the subject-matter of the transfer is of merchantable quality or fit for a particular purpose, or whether the transfer itself is formally valid. Contractual questions governed by *lex actus*

The solution is not so obvious, however, where the question relates not to the personal rights of one party against the other, but to his right to some possessory or proprietary right in the chattel itself. If, in such a case, the *lex situs* and the proper law are not coincident, which is to prevail? It has been said that 'when the proper law of the transfer (*lex actus*) differs from the *lex situs* of the tangible movable at the time of the transfer, the *lex situs* governs the effect of the transfer on the proprietary rights of the parties thereto and of those claiming under them in respect thereof'.¹ Sensible, proprietary questions governed by *lex actus*

This statement is no doubt true where a claim good according to the *lex situs* is made by a third party, but there is no English authority which supports it where the dispute is confined to the parties themselves. The matter may be tested by the following hypothetical case that might well occur in fact.

A, domiciled and resident in England, executes an instrument in London granting possession of a crane which is stored at Naples to *X*, a London builder, upon hire-purchase terms under which the ownership is not to pass to *X* until he has paid the stipulated number of instalments. The crane is required by *X* in connexion with certain building operations in London.

If, upon the default by *X* to pay an instalment, *A* were to demand resumption of possession of the crane while it was still at Naples, it would be wholly unjustifiable to refer his claim to Italian law, whether the guiding consideration be principle, convenience, the expectation of the reasonable man or even plain common sense.

It is, therefore, submitted that on principle questions of a proprietary or possessory nature affecting the validity or effect of a transfer and arising between the parties themselves are governed by the proper law of the transfer where this law differs from the *lex situs*. It must be admitted, however, that this principle must stand or fall on principle alone, for no authority is to be found by which it is either supported or rejected.² No clear authority

¹ Dicey, Rule 87, p. 539.

² The nearest approach to a relevant decision is *Inglis v. Usherwood* (1801),

Question of
the passing
of the pro-
perty in
movables

The proposition that the proper law prevails over the *lex situs* encounters a difficulty, more apparent than real, when these two laws have different rules concerning the passing of the property in movables. According to the present submission, if specific goods situated in country *X* are sold for cash in London under a contract that is subject to English law, the English rule that the title passes to the buyer on the completion of the contract prevails over a contrary rule of the law of *X*. To apply English law to the exclusion of the *lex situs* raises no practical difficulty, so long as the question is confined to the parties themselves or to their representatives. If anything further, such as delivery of possession, is required by the law of *X* to complete the title, the buyer, by the enforcement of the contractual side of the transaction, can compel the seller to take what steps are necessary. It is true, of course, that if, before these steps have been taken, the seller re-sells the goods to a third party and delivers possession to him in *X*, the title recognized by the proper law of the first sale cannot, by the very necessity of the case, avail the English buyer. *X* law, having control of the goods, can make its own view effective. But this fact does not disturb the principle that, as between the parties, the proper law determines whether the property in goods has passed to a buyer.

Gifts

The same principle holds in the case of a gift *inter vivos* of chattels. If, merely by words of present gift spoken in London, an Englishman purports to pass to another the ownership of a horse kept at stables in Paris, no title whatsoever will pass to the donee. He will be frustrated by the English rule that a gift of chattels is a nullity unless confirmed by delivery or executed under seal. Even if French law were to have a less rigorous rule, it would not avail the donee. The exact point arose in *Cochrane v. Moore*¹ and was decided according to English law, but unfortunately French law was not pleaded. In another case it was necessary to determine the effectiveness of a *donatio mortis causa* of moneys in Monaco made by a testatrix who died domiciled in England. Russell J. held that English law applied as being the *lex domicilii* of the testatrix, that therefore an effective parting with dominion was required to make the gift valid, but that what was sufficient to pass the dominion must be determined by the law of Monaco.² Earlier Eve J. had

¹ East 515, but there Russian law was the *lex situs*, the *lex loci actus*, and also apparently the proper law of the transfer.

² [1890] 25 Q.B.D. 57.

² *In re Craven's Estate*, [1937] Ch. 423.

held that the validity of a gift *mortis causa* is subject to the *lex situs*, but in the case with which he had to deal English law represented both the *lex situs* and the proper law.¹

2. Questions affecting third parties.

The introduction of a third party raises different considerations and provokes a contrary line of approach. It is no doubt true that if a third party claims derivatively under one of the original parties to a particular transaction his claim should in principle be tested by the proper law, not by the *lex situs* at the time of the transfer,² and this no doubt is the rule where he appears as trustee in bankruptcy of one of those parties. Indeed, if the matter were to be viewed solely in the light of principle and logic, the proper law would determine all cases of derivative claims. To revert once more to our hypothetical case of the crane,³ suppose that *X*, the hire-purchaser, journeyed to Naples, took possession of the crane, and sold it to *Y*, an Italian. Presuming that Italian law would vest ownership in *Y*, an action brought against him by *A* should none the less, on general principles of jurisprudence, be tried according to English law, for the alleged derivative title of *Y* should stand or fall with *X*'s title from which its derivation is claimed. This was admitted by Turner L.J. in *Hooper v. Gumm*.⁴

Nevertheless, as Holmes once said, 'The life of the law has not been logic, it has been experience',⁵ and in this type of case logic and principle must certainly yield to expediency. The *lex situs* must prevail on practical grounds. As Wolff says:

'Real rights should be as manifest as possible; third parties who intend to acquire a right in a thing must be protected against the risk that such thing might be subject to a foreign law under which the acquisition would be void. While under the law of contracts the contracting parties have a choice as to the applicable law because they alone are affected by the contract, the acquisition of a right *in rem* is something which concerns or may concern a great number of unknown strangers. As the place where a thing is situate is the natural centre of rights over it, everybody concerned with the thing may be expected to reckon with the law of such place.'⁶

This rule, that the *lex situs* prevails over the proper law, applies to two distinct types of case.

¹ *In re Korvine's Trusts*, [1921] 1 Ch. 343.

² Wharton, *Conflict of Laws* (3rd ed.), p. 690.

³ *Supra*, p. 475.

⁵ *The Common Law*, p. 1.

⁴ (1867), 2 Ch. 282, at p. 289.

⁶ Wolff, *op. cit.*, p. 520.

First, where a title, good by the *lex situs* at the time of its alleged acquisition, is claimed derivatively from one of the parties to an earlier transaction affecting the same movables and governed by a foreign proper law.

Secondly, to cases where the *lex situs* divests the title of the person recognized as owner by some foreign law or, while recognizing that title, subordinates it to a lien or other possessory right of its own making.

These two cases require separate treatment.

Third party
claims
derivatively

A familiar example of a derivative claim occurs where the subject-matter of a conditional sale, by which the ownership remains in the seller, is taken by the buyer from country *X*, where the sale was completed, to country *Y* and there sold to an innocent purchaser. If the derivative right of the purchaser is repudiated by the law of *X*, but recognized by the law of *Y*, it becomes necessary to decide which of these laws shall govern the matter. The instinctive reaction of the lawyer is to choose the law of *X*. Not only has it been said by high authority that 'a good title acquired in one country shall be a good title all over the globe',¹ but elementary principle demands that whether the vendee possesses a title capable of transfer shall be determined by the law under which he acquired his right to the subject-matter. However, justice and expediency demand that the *bona fide* transferee of movables shall be protected if he acts according to the local law, and there can be no doubt that a derivative title to movables, recognized as valid by the law of the country where the movables were situated at the time of its acquisition, will be regarded as valid by English law. A good title acquired under the proper law of a transfer is a good title all over the globe, unless and until it is displaced by a new title acquired under a foreign *lex situs*.²

Lex situs
means the
law that
would be
applied by
a court at
the *situs*

But it is essential to appreciate exactly what is meant in this connexion by the ambiguous expression *lex situs*, for it does not necessarily mean the rule that a court sitting at the *situs* would apply to a purely domestic case containing no foreign element.³ The English court must ascertain what rule a court of the *situs* would apply to the particular case under consideration.

Suppose, for instance, that a car transferred in England by *A* to *B* under a hire-purchase agreement is taken by *B* to Holland and is there

¹ *Simpson v. Fogo* (1863), 1 H. & M. 195, 222, per Page-Wood V.-C.

² Cp. Niboyet (1928 ed.), p. 638.

³ Cp. Cook, *Logical and Legal Bases of Conflict of Laws*, pp. 263 et seqq.

sold to *C*. Suppose also that Dutch internal law requires hire-purchase agreements to be recorded in a public register, and holds that whether a sale by the hirer is binding upon the owner depends upon whether the agreement has been recorded.

A Dutch court, if required to adjudicate between *A* and *C*, would be confronted with a conflict of laws case. It would therefore be obliged to examine its own internal law in order to ascertain whether the necessity of recording a hire-purchase agreement applied to an agreement made abroad between two foreigners. This would necessitate an investigation into the policy of the law. Was the object to protect persons in Holland who paid money on the faith of an ostensibly good title? If so, registration would be necessary in the case of all movables within the jurisdiction, no matter where or between whom the hire-purchase agreement had been made. If this were the correct interpretation of the registration law, then an English court, if seised of the case, should decide in favour of *C*. But the policy of the Dutch law might be different. Its design might be to strike only at agreements concluded in Holland. Or, though its object might not be restricted in this way, the Dutch courts, in the case of agreements concluded abroad, might have made the validity of a foreign agreement not registered in Holland turn upon whether the owner had consented or had not consented to the removal of the movables to another country.

This simple truism, that the *lex situs* means the law that a court at the *situs* would apply to the case in hand and not necessarily the domestic law applicable to a purely domestic case, illustrates the correct role of private international law so far as individual assignments of movables are concerned. Its role is to choose what law shall determine the conflicting claims of the parties. Its function in this regard is completed as soon as it has ruled that the *lex situs* governs. Once this ruling has been given, once the choice of law has been made, we pass from the sphere of private international law, and it merely remains for the English court to ascertain as a fact what particular principle a court at the *situs* would follow in the actual circumstances. This appears to be an obvious and elementary observation, but it is sometimes overlooked, with the result that the complications of a part of the law not remarkable for its simplicity are needlessly increased. In dealing with the 'choice of law' problem that arises where the subject-matter of a hire-purchase agreement is removed to a foreign country

Respective
functions
of private
inter-
national
law and the
lex situs

and there sold, authors sometimes say that the governing law depends upon whether the removal was with or without the consent of the owner. If the removal was without his consent, they say that the question arising between the owner and the purchaser is governed by the law to which the hire-purchase agreement is subject; otherwise it is governed by the domestic rule of the *lex situs*. This distinction, however, forms no part of the English rule for the choice of law. The law of the *situs* of the goods at the time of their sale is chosen because, to repeat the words of Wolff, 'the place where a thing is situate is the natural centre of rights over it', and it therefore follows that whether those rights depend upon consent to removal or upon any other factor is a matter solely for the law of that place to determine.

Dulaney v. Merry The authorities, so far as they go, appear to support the proposition that the English court, when required to apply English law as being the *lex situs* in a foreign element case, does not necessarily apply the ordinary domestic law of England. *Dulaney v. Merry & Son*,¹ though it concerned a general assignment, may be given by way of analogy.

Two domiciled Americans executed a deed in Maryland by which they assigned all their property wherever situate to another domiciled American for the benefit of their creditors. The deed was valid by the law of Maryland, but it was not registered under the English Deed of Arrangement Act, 1887.

The question was whether the assignee was entitled to goods situated in England. This was determinable by the *lex situs*, English law. Had a similar assignment been effected in England between English traders concerning goods situated in England alone, there is no doubt that the deed would have been void. But this was a conflict of laws case, and therefore a necessary inquiry was whether the English statute was designed to strike at all assignments, wherever made, affecting goods in England, or whether its operation was confined to assignments made in England. After stating that the English legislature may enact rules as to the passing of the property in goods situated in England notwithstanding what the law might be in the country of the owner's domicile, Channell J. said that the question before him reduced itself to the construction of the Act of 1887. After subjecting this to a critical examination, he came to the conclusion that the policy of the Act as

¹ [1901] 1 Q.B. 536.

disclosed by its language was not to bring within its provisions an assignment by foreign debtors affecting goods abroad as well as goods in England. By internal English law, therefore, the Maryland assignment was valid with regard to the English goods.

It may be excusable, perhaps, to examine the New York case of *Goetschius v. Brightman*¹ as a final illustration of how the *lex situs* should be ascertained when chosen to govern a question arising out of a transfer of movables. The facts were simple:

X obtained possession of a car in California from *Y* under a conditional sale contract by which the title remained in *Y* until the whole price had been paid. The contract expressly provided that the car should not be removed from California. *X*, however, took it to New York and there sold it to the defendants. The conditional sale was recorded neither in New York nor in California. By the domestic law of California applicable to a purely domestic case, the title of *Y* would prevail over that of the defendants; by the equivalent law of New York the title of the defendants would be preferred. The plaintiff was the assignee of *Y*.

The New York court, though it applied New York law as being the *lex situs*, found for the plaintiff. It is believed that the following is a fair summary of the judgment: the law which governs the interpretation and effect of the conditional sale is Californian law. By that law the title of the plaintiff is superior to that of the defendants. But, since the defendants bought the automobile while it was present in New York, it does not follow that New York law will recognize the superiority of the plaintiff's title.

'No rule of comity requires this State to subordinate its public policy in regard to transfers made within the State of property situated here to the policy of the State where the owner of the property resides or where he acquired title.'

The law of New York applies as being the *lex situs*. But what is the New York rule applicable to the circumstances of this case? A particular *lex situs* may prescribe that a person in the position of the present plaintiff may be divested of his title if the chattel has been removed out of his State whether with or without his consent. That, however, is not the rule in New York. The rule is that an owner shall not lose his title if the chattel is brought here without his consent. It is true that a conditional sale is

¹ (1927), 245 N.Y. 186; Cheatham, *Cases on the Conflict of Laws* (2nd ed.), p. 776.

void by New York statutory law against a purchaser unless it is filed, but this is confined to sales effected in New York, not in some other State or country.

Title of owner
divested by
lex situs The second class of case where the *lex situs* prevails arises where that law either divests the existing title under the foreign law or subordinates it to a possessory right in favour of a third party. There is adequate English authority on these matters.

The claim of a third party founded upon and substantiated under the existing *lex situs* of movables prevails over a title regarded as superior by any other law. The leading case is *Cammell v. Sewell*,¹ where the facts were these:

A Russian seller shipped in Russia a cargo of timber on a Prussian vessel to an English merchant in England. The vessel having been wrecked off the coast of Norway, the timber was sold to *X* at a public auction held at the instance of the master in Norway. A suit, brought by the underwriters in the Norwegian court to set aside the sale, failed. *X* shipped the timber to England and transferred it to the defendants. The underwriters sued the defendants for its value.

By English law, the auction sale had not affected the title vested in the merchant by the original contract and now vested in the plaintiffs. The defendants, however, did not deny the effect of that contract. They confessed and avoided it. Their case was that, by virtue of what happened in Norway at the time when the timber was there, they had acquired a title which under Norwegian law overrode that of the earlier English purchaser. The Court of Exchequer gave judgment for the defendants on the ground that the decision of the Norwegian court was a judgment *in rem* which vested the property in *X* as against the whole world. Upon appeal, the Court of Exchequer Chamber, without giving a definite decision upon the point, were of opinion that the judgment was not a judgment *in rem*, but they decided (Byles J. dissenting) that the title conferred on *X* by Norwegian law must prevail. Crompton J. said:

‘We think that the law on this subject was correctly stated by the Lord Chief Baron . . . when he says, “If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.”’

He instanced the case of a foreigner’s goods being sold by a thief in market overt in England, and said that the property, being vested in the purchaser according to English law, would not be divested if the purchaser took them into the foreigner’s

¹ (1858), 3 H. & N. 617; (1860), 5 H. & N. 728.

country. Byles J. dissented on the ground that the English rule, which prohibits a master from selling the cargo except in a case of inevitable necessity, is part of the universal law maritime; and he also refused to accede to the sweeping rule which Crompton J. adopted from the Lord Chief Baron.

Reduced to its simplest terms, then, *Cammell v. Sewell* decides that a man loses his ownership of goods if they are taken to another country and there transferred in circumstances sufficient by the local law to pass a valid title to the transferee.

The result is the same where movables have been seized by creditors in accordance with the *lex situs* at the time of their seizure. In such a case the rights vested in the creditors by the local law prevail against all persons claiming under some other law. Thus in *Liverpool Marine Co. v. Hunter*:¹

Seizure by
creditors

A British ship was mortgaged in England by *X*, a British subject, to *Y*, another British subject. It was later arrested at New Orleans, Louisiana, by certain British subjects who were creditors of *X*. The mortgage was void according to the law of Louisiana. In order to avoid a sale of the ship by the New Orleans Court, *Y* gave bonds to the creditors for the amount of their debts. *Y* subsequently filed a bill in England to restrain the creditors from suing on the bonds. Judgment was given for the creditors.

The mortgagee's argument was that the defendants had been guilty of inequitable conduct in taking legal action in America, but it was held that since the creditors owed no duty to the mortgagee, they were clearly entitled to avail themselves of the local procedure in respect of property within the jurisdiction. This, like *Cammell v. Sewell*, was a case where the owner's rights in a chattel were overridden by the operation of the *lex situs*.

A similar situation arose in *Inglis v. Robertson*,² where the facts were these:

G, a domiciled Englishman, the owner of whisky stored in a warehouse at Glasgow, held delivery warrants issued by the warehouse-keeper stating that the whisky was held to *G*'s order or 'assigns by endorsement hereon'. *G*, in return for a loan, delivered in London to *Inglis*, an English merchant, a letter of hypothecation stating that the whisky was deposited with him as security for the loan, with power of sale. He indorsed the warrants and handed them to *Inglis*. *Inglis* gave no notice of his right to the warehouse-keeper. *Robertson*, claiming

¹ (1867), L.R. 4 Eq. 62; (1868), L.R. 3 Ch. 479. Lalive does not regard this case as an authority on the transfer of chattels, op. cit., p. 69.

² [1898] A.C. 616.

as personal creditor of G, arrested the whisky in the hands of the warehouse-keeper.

Presuming that by English law Inglis, claiming through G, had a better right to the whisky than Robertson, would that conclude the matter in his favour? It would not do so if Scottish law were applicable, for the rule in Scotland is that a pledgee who wishes to make his pledges effective in such circumstances must give notice to the warehouse-keeper, otherwise his right is subordinated to the claims of the pledgor's creditor. The House of Lords gave judgment for Robertson. Lord Watson refused to discuss the internal law of England. After stating that Robertson had done what was necessary by Scottish law to acquire a real right against the whisky, he proceeded as follows:

'It would in my opinion be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be according to the law of that country, but is not according to the law of Scotland, sufficient to create a real right in the goods.'

Again:

'The crucial question in this case is whether the right . . . vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodian for G as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property in the whisky, or, in other words, a *jus in re*, in the pledgee.'

Case of
goods in
transitu

The transfer of movables while they are in course of transit raises a difficult question of choice of law.²

Suppose, for instance, that a parcel of goods has been dispatched overland from London to Bucharest, and that before reaching its destination it has been the subject of a sale or some other commercial transaction. The problems that such circumstances raise become more complex if

¹ [1898] A.C. 616, at p. 625.

² For a fuller discussion see Lalive, *op. cit.*, pp. 186-93 Wolff, pp. 519-21; Hellendall, 17 *Canadian Bar Review*, 25 et seqq.

the parties have different domicils, or if the transaction is effected in some country other than Romania or England.

What law should be applied in such a case has not arisen in the English courts, the probable explanation being that goods in transit are generally represented by a bill of lading or other documentary symbol of ownership which is capable of an independent dealing.¹ Jurists have advocated several laws, such as the *lex situs*, the *lex domicilii* of the owner, the law of the place of ultimate destination, the law of the place of dispatch and the proper law of the particular transfer. Objections may be raised to each of these. The *lex situs*, owing to its inconstancy, is an impracticable choice unless the movables have come to a definite resting-place at the time of the transfer. The domicil of the owner is not a suitable criterion of the law to govern a mercantile transaction. The law of the stipulated place of destination, though an appropriate choice in many circumstances, suffers from the disadvantage that it may be and frequently is altered during the course of the transit. 'I am not prepared to hold', said Lord Watson, 'that whenever the cargo of a ship is destined to a port in one country, the dealings of the owner of the cargo with the bill of lading which represents and carries the property of the goods must in every other country be governed by the law of the *locus* where the ship is to unload.'² The law of the place of dispatch is not well adapted to govern a transfer effected abroad when the transit is nearing completion. The proper law is, no doubt, suitable to govern questions dependent upon the effect of a particular transaction but scarcely apposite to every question.

The truth again is that no one law can be made the exclusive arbiter of disputes arising out of a transfer of goods *in itinere*. The problems must be broken down. A dispute between the parties to a particular transaction, as, for example, a mortgage of the goods granted by the assignee, will be governed by the proper law of the transaction.³ If the movables come to rest

The theories

No one law governs exclusively in all cases

¹ There is, however, no clear authority upon what law governs the transfer of a bill of lading or other document of title to goods. The three possibilities seem to be the proper law of the bill of lading, the *lex situs* of the bill at the time of its endorsement, and the *lex situs* of the goods at that time. The point is important, since in some countries, e.g. France, the endorsement of a bill of lading does not pass the property in the goods; 17 *Canadian Bar Review*, 18-25. It is suggested that the correct choice is the *lex situs* of the bill of lading at the time of its endorsement.

² *Inglis v. Robertson*, [1898] A.C. 616, 627.

³ In *North Western Bank v. Poynter*, [1895] A.C. 56, the House of Lords was

sufficiently to admit of a dealing with them, as where they are seized by creditors in accordance with the local law or wrongfully sold by the carrier, the question of title must clearly be determined by the *lex situs*.¹ If the transit is by sea in one ship, there is much to be said for applying the law of the flag.²

II. ASSIGNMENTS OF *CHOSSES IN ACTION*

Different kinds of choses in action *Choses in action* may be divided into rights which are mere rights of action, and rights which are represented by some document or writing that is not only capable of delivery but in the modern commercial world is negotiated as a separate physical entity. A debt, arising from a loan or an ordinary mercantile contract, is an example of the first class, while the second class is chiefly exemplified by negotiable instruments and shares. It is proposed here to keep the two classes separate, and to deal first with debts, secondly with negotiable instruments, and thirdly with shares.

(a) *Debts*

- (1) The various theories. *Pages 486-91.*
- (2) The modern law stated. *Pages 491-8.*
 - (i) Voluntary assignments. *Pages 492-9.*
 - (a) Questions dependent solely upon the validity and effect of the assignment. *Pages 492-6.*
 - (β) Questions dependent upon the nature of the right assigned. *Pages 496-9.*
 - (ii) Involuntary assignments. *Pages 499-501.*

(1) *The various theories*

The legal systems capable of application The conflict of opinion which impedes the search for the proper law to govern an assignment of *choses in possession* is equally evident in the corresponding case of debts. Various theories have been propounded. The law of the place where the creditor is domiciled; the law of the place where the debt may be said to have an artificial situation; the law of the place where the assignment is made; the proper law of the assignment; the proper law of the transaction that created the debt; all these legal systems have found their advocates.

prepared to apply the English proper law of a transfer between *A* and *B* to the right of creditors to seize the subject-matter in Scotland.

¹ *Cammell v. Sewell*, *supra*, p. 482.

² *Cp. Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115.

Story chooses the law of the creditor's domicil.¹

*Lex
domicilii
of creditor*

'This head', he says, 'respecting contracts in general may be concluded by remarking that contracts respecting personal property and debts are now universally treated as having no *situs* or locality; and they follow the person of the owner in point of right (*mobilia inhaerent ossibus domini*); although the remedy on them must be according to the law of the place where they are sought to be enforced. . . . They are deemed to be in the place, and are disposed of by the law, of the domicil of the owner, wherever in point of fact they may be situate.'

In the three sections which he devotes to the subject² he produces an impressive list of Continental authorities, but does not cite any clear decision, either English or American, in favour of the creditor's domicil.

There appears to be neither authority nor reason for choosing the *lex domicilii* as such, either of the creditor or the debtor, as the proper law to govern an assignment of a debt, and in fact cases may be put in which the choice would lead to absurdity. If a domiciled Englishman, having acquired a right to receive a sum of money from a German by reason of some commercial transaction governed by the law of France, were to assign that debt first to one man in Italy and then to another in Switzerland, it is difficult to adduce any principle which would justify the settlement of a dispute between the parties according to the law either of England or of Germany. On the contrary, the assignee of a debt could not reasonably be expected to realize that he was subjecting his rights to the *lex domicilii* either of the creditor or of the debtor, especially as the place of domicil might well be an unknown quantity.

*Objections
to lex
domicilii*

Westlake, having asserted that assignments of corporeal movables are governed by the *lex situs*,³ maintains that the forum for the recovery of a debt presents a close analogy to the *situs* of a corporeal movable, and states the English rule to be that 'the assignee who has acquired a good title by the law of the forum for the recovery of the debt must prevail'.⁴

Lex situs

With regard to this theory there can, of course, be no doubt that a debt is deemed by English law to have a definite locality of its own for several different purposes, such as the exercise of jurisdiction, the payment of death duties, and the grant of probate or of letters of administration.⁵ The necessity for this

*Recognized
that a debt
possesses a
situation*

¹ S. 362. To the same effect, Phillimore, iv. 544.

² S. 362-362b.

³ S. 150.

⁴ S. 152.

⁵ See, for example, *A.-G. v. Bouwens* (1838), 4 M. & W. 171, 191; *Commissioners of Stamps v. Hope*, [1891] A.C. 476, 481-2; *A.-G. v. Lord Sudeley*,

and the test by which the locality is determined have been explained by Atkin L.J. in the following words:

'A debt, or a *chose in action*, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or a *chose in action* is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration, because the jurisdiction of ecclesiastical authorities was limited territorially. The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was: Where was the debtor residing? . . . The reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt.'

Debt
situated
where
debtor
resides

This rule, that a *chose in action*, such as a right to recover a loan² or money due under an insurance policy,³ is situated in the country where the debtor resides,⁴ encounters an apparent difficulty where, as will often occur in the case of a corporation, the residence extends to two or more countries. Since the place of residence is chosen because it is there that recovery by action is possible, it has been suggested that a debt is situated in the country where it is payable even though this does not represent the residence of the debtor. The courts, however, have not taken this view. They have insisted that the residence of the debtor is 'an essential element in deciding the *situs* of the debt'.⁵ If the debtor resides in two or more countries, then indeed the debt is situated in the one in which, either by the contract itself or by the general law, it is payable;⁶ but if he resides only

[1896] 1 Q.B. 354, 360-1; *In re Maudslay Sons & Field*, [1900] 1 Ch. 602; 13 *Canadian Bar Review* (May 1935), 265-78, article by Dean Falconbridge.

¹ *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101, 119.

² *In re claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

³ *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139; *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101.

⁴ *Swiss Bank Corporation v. Boehmische Industriale Bank*, [1923] 1 K.B. 673, 678; *Sutherland v. Administrator of German Property* (1933), 50 T.L.R. 107.

⁵ *Deutsche Bank und Gesellschaft v. Banque des Marchands de Moscou* (unreported, C.A. 1930, but cited, *In re claim by Helbert Wagg & Co. Ltd.*, *supra* at p. 152); the quotation in the text is from Greer, L.J.

⁶ *In re Russo-Asiatic Bank* [1934] Ch. 720. A debt due from a bank to a customer, for instance, is deemed by the general law to be situated at the branch where the account is kept, *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B.

in one country, it is there alone that the debt is situated notwithstanding that it may be expressly or implicitly payable elsewhere.¹

The fact, however, that a debt possesses a definite, though artificial, situation does not necessarily imply that its assignment should be governed by the *lex situs*. *Lex situs*
does not
govern all
questions

English judges have more or less consistently said that an assignment is governed by its *lex loci actus*.² *Lex loci
actus*

They have expressed the view, for instance, that if *A* executes two instruments in Guatemala, by which he assigns, first to *X* and subsequently to *Y*, a sum of money held on his behalf by a London Bank, the question whether *X* or *Y* is entitled to the money must be determined by the law of Guatemala as being the *lex loci actus* of each assignment.³

Another theory, which does not appear to have been canvassed, is that the governing system is the *lex actus*, i.e. the law of the country with which the assignment is most closely connected. This is preferable to the *lex loci actus*, since it does not depend upon the chance place of execution, but nevertheless it would seem to be less convenient than still another law which will now be discussed. *Lex actus*

It is submitted that there is an obvious answer to the question—What is the most appropriate law to govern questions arising from the voluntary assignment of a *chose in action*? The clue is furnished by Foote, when he says that the assignment of a *chose in action* arising out of a contract is governed by the proper law of the contract.⁴ If we understand him correctly, the appropriate law is not the 'proper law' (using that expression in its contractual sense) of the assignment, but the proper law of the original transaction out of which the *chose in action* arose. It is reasonable and logical to refer most questions relating to a debt to the transaction in which it has its source and to the legal system which governs that transaction. If the transaction under which *A* lends money or sells goods to *B* is connected with no other country but England, *A* acquires a right that is admittedly governed by English law. The right Proper law
of trans-
action that
created the
debt

110, 127; *Clare & Co. v. Dresdner Bank*, [1915] 2 K.B. 576; *Richardson v. Richardson*, [1927] P. 228.

¹ *In re claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323.

² *Lee v. Abdy* (1886), 17 Q.B.D. 309; *Alcock v. Smith*, [1892] 1 Ch. 238; *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677; *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669; *In re Anziani*, [1930] 1 Ch. 407; *infra*, p. 495.

³ *Republica de Guatemala v. Nunez*, *supra*.

⁴ *Private International Law* (5th ed.), p. 296.

thus created under the aegis of English law should, so far as its assignability is concerned, be governed throughout its existence by English law. This is not to deny that certain questions are determinable by the proper law of the assignment itself, as for example those concerned with the formal validity of a particular assignment and arising between the parties or their representatives. But when the question travels beyond these boundaries—when, for example, it is denied that the right is capable of assignment—a solution must obviously be sought elsewhere. What is more reasonable than to refer to the law that admittedly continues to govern the subject-matter of the assignment? One undeniable merit of this is that, where there have been assignments in different countries, no confusion can arise from a conflict of laws, since all questions are referred to a single legal system. The same merit is not shared by the *lex situs*, since this follows the residence of the debtor and is not therefore a constant.

Doctrine of
the proper
law illus-
trated

Two illustrations may be given to show that the application of the proper law of the original transaction out of which the debt arose is at least logical.

A policy of life assurance issued by an English company is undeniably governed by the law of England. Both parties, for instance, contemplate that the policy may be assigned in any part of the world and that payment must be made to the assignee no matter where his title was acquired, but the reasonable inference is that they intend the effect of the assignment, so far as the liability of the company is concerned, to be governed by English law.

Again, if an Englishman contracts a debt as the result of the purchase of goods from another Englishman in London, his obligation, if expanded in words, is to pay not only the seller but also any assignee of the seller, provided however that the assignment is good by English law. What governs his liability to the seller must also govern his liability to any person deriving title from the seller.

In each of these two cases the attention of the debtor, when he assumes that role, is confined solely to the legal system under which he contracts the obligation, and the reasonable inference is that any transfer of the obligation made by the creditor shall be governed by the law of England as being the legal system to which the subject-matter of the transfer owes its existence.

Doctrine of
the proper
law justi-
fied

Let us turn from the debtor and, taking the test of the reasonable man, contemplate the attitude of mind of an assignee. If *B*, the debtor under the original transaction from which the obligation sprang, takes up his residence in Italy,

and *A*, the creditor, makes in France an assignment of the debt to *X*, it is reasonable to presume that *X*, as a prudent man of business, will concentrate his attention upon the transaction which gave rise to *B*'s obligation to pay, for it is the benefit of that obligation of which he is a purchaser. It will naturally occur to him that an obligation having its origin in, and drawing its protection from, English law will in all respects be subject to that law, just as much as if the subject-matter of the assignment were goods situated in England or shares in an English company, and we should naturally expect him to inquire what is necessary under English law for the completion of an effective assignment. What would not occur to him would be to consider the law of Italy merely because of the debtor's presence in that country. It would, perhaps, be convenient to allow the law of France, *qua* the proper law of the assignment, to govern the rights of *A* and *X* *inter se*, but, to take only one example, it cannot solve a question of priorities between *X* and an assignee claiming under an assignment made in some other country, except in the simplest case.

Suppose, to alter the instance given on page 489, that *A* makes an assignment to *X* in Guatemala, and later, in fraud of *X*, makes another assignment to *Y* in Italy.

There is here no common *lex loci actus* and no common *lex actus*. If the Italian and Guatemalan rules of priority differ, the dispute between *X* and *Y* cannot be settled by reference either to the law of the place of the assignment or to the proper law of the assignment, for there are two such laws, each independent, with no arbiter to decide which of them shall prevail.

It is submitted, then, that the most appropriate law to govern the question at any rate of priorities is the proper law of the transaction by which the subject-matter of the various assignments was created. It is further submitted that this principle was adopted by Warrington J. in *Kelly v. Selwyn*.¹

(2) *The modern law stated*

We must now, however, abandon theory and attempt to ascertain from the English authorities what law governs the assignment of a debt. This question is for two reasons not so simple as it may appear.

First, there are two types of assignment, the voluntary and the involuntary. The former occurs where the creditor of his

¹ [1905] 2 Ch. 117; *infra*, p. 497.

Division
of the
subject

Voluntary
and in-
voluntary
assign-
ments

own will transfers his right to another person; the latter, where his right is transferred against his will by operation of law, as, for example, where in the course of execution the debt is attached as being part of his assets.

Matters
affecting
voluntary
assign-
ments
classified

Secondly, the questions in which the issue is the validity or effect of an assignment fall into two classes. The issue may depend solely upon the validity and effect of the assignment itself, as, for example, where the dispute relates to capacity, form or essential validity; or it may depend upon the validity and effect of the original transaction by which the debt was created, as, for example, where the question is whether the debt is capable of assignment, or to which of two or more competing assignees it is payable. The burden of the following pages is that the first class of question is governed in general by the proper law of the assignment, the latter by the proper law of the transaction that created the debt.

(i) *Voluntary assignments.*

*Republica
de Guate-
mala v.
Nunez*

(a) *Questions dependent solely upon the validity and effect of the assignment.* Before discussing the topics that fall within this class of question it will be convenient to state the facts of the important case of *Republica de Guatemala v. Nunez*,¹ to which reference must frequently be made.

In 1906 Cabrera, who was then President of Guatemala, deposited a sum of money with a London bank. In July 1919, while still President, he addressed a letter to the bankers requesting them to transfer this sum to Nunez, his illegitimate son. Cabrera was deposed and imprisoned in 1920. While imprisoned he assigned under duress the sum to the Republic, acknowledging that he had misappropriated it from the public funds. In an action brought by the Republic to recover the money, Nunez claimed ownership by virtue of the assignment of 1919. This assignment was valid by English law but void by the law of Guatemala because (i) being unsupported by consideration, it should have been made on stamped paper and signed by Nunez before a notary, and (ii) Nunez, being a minor, lacked capacity to accept a voluntary assignment. It will be observed that English law was the *lex situs* of the debt and also the proper law of the transaction out of which the debt arose, but that Guatemalan law was the *lex loci actus* and the proper law of the assignment, and also the *lex domicilii* of the assignor and assignee. It was held by Greer J. and by the Court of Appeal that the validity of the assignment to Nunez must be determined by the law of Guatemala. The decision was unanimous, but, as we shall see, the reasons upon which it was based were varied and conflicting.

¹ [1927] 1 K.B. 669.

We will now deal separately with the various causes for which the assignment of a debt may be invalid, premising our remarks with the observation that, since an assignment arises from a contract between the assignor and the assignee, the rules for the choice of law in this connexion should as far as possible be the same as those which apply to contracts.¹

Similarity
of assign-
ments to
contracts

Capacity. The assignment of a debt, so far as concerns the capacity of the parties, stands on the same footing as a mercantile contract, in which case the question is governed by the proper law of the contract.² On this footing, the governing law will be the law of the country with which the assignment itself is most closely connected. This seems correct on principle, but unfortunately, in the few cases that have raised the question, the courts have shown a preference for the *lex loci actus*. In *Lee v. Abdy*:³

Capacity
generally
said to be
governed
by *lex loci
actus*

A policy of life insurance issued by an English company was assigned at the Cape by a husband to his wife. The assignment was valid by English law, but was invalid by the law of Cape Colony, where the parties were domiciled, because the assignee was the wife of the assignor. The insurance company, when sued by the wife for the recovery of the money, pleaded that the assignment was void.

*Lee v.
Abdy*

It was held that the law of Cape Colony governed the assignment. There is much to be said for the view that the proper law of the assignment was the law of the Cape, for it was there that the parties were domiciled and the assignment was effected, but the judgments leave little doubt that the mechanical test of the place of the transaction was applied by the court.

In *Republica de Guatemala v. Nunez*,⁴ Scrutton L.J. gave as one of his reasons for deciding against the claim of Nunez the fact that he was incapable by the law of Guatemala. He said that 'in cases of personal property, the capacity of the parties to a transaction has always been determined either by the *lex domicilii* or the law of the place of the transaction; and where, as here, the two laws are the same it is not necessary to decide between them'.⁵ It is a little surprising in these latter days to meet the suggestion that the capacity of a person to enter into a mercantile contract is determined by the law of his domicile;

*Lex loci
actus*
supported
by Scrutton
L.J.

¹ 'The assignment here in question is an assignment that exists, if at all, by virtue of a contract between assignor and assignee, and I cannot see how, if there was no valid contract between them, there can be any valid assignment'; *Lee v. Abdy* (1886), 17 Q.B.D. 309, 313, *per* Day J.

² *Supra*, pp. 230-2.

³ (1886), 17 Q.B.D. 309.

⁴ *Supra*, p. 492.

⁵ [1927] 1 K.B. at p. 689. Lawrence L.J. agreed with him on the point.

little less surprising is the suggestion that the determining law is the *lex loci actus*, if that expression is to be taken literally. Is an assignment by an Englishman to his wife of a debt situated in London and governed by English law to be held void, merely because he executes the instrument of transfer at the Cape while on a short visit to South Africa?

Does *lex loci actus* mean the proper law?

The only question is whether the judges in these two cases meant the expression *lex loci actus* to be taken literally and rigidly, or whether they intended to indicate the proper law of the assignment. The *lex loci contractus* so often constitutes the proper law of the contract that even judges are apt to adopt the former expression when their intention is to refer to the proper law. This was especially true in the 'eighties when *Lee v. Abdy* was decided. In fact in that case Day J. stated the rule for contracts in language that was scarcely felicitous. He said: 'The general rule is that the validity and incidents of a contract must be determined by the law of the place where it is entered into.'¹

Lex loci actus said to govern formalities

J Formalities. In the chapter on contracts we have seen that a contract is formally valid if it is made in accordance with the formalities required either by the *lex loci contractus* or by the proper law. There is no adequate reason why the same rules should not apply to the assignment of a *chose in action*.

In *Republica de Guatemala v. Nunez*,² Scrutton L.J., agreeing on this point with Greer J., decided against the claim of Nunez on a second ground. He said:

'A contract void in the place where it is made, by reason of the omission of formalities required by the law of that place, is void elsewhere.'³

There is no need to add anything to the criticism already directed against this rigid view that the *lex loci* is the exclusive determinant,⁴ except perhaps to ask this question—Is the assignment of an English debt made by an Englishman to his infant son to be regarded as void, merely because the instrument of transfer was executed at Istapa, without the local formalities, while the parties were on a short visit to Guatemala?

Lex situs said to govern formalities

In the same case Lawrence L.J. held that, since the debt was situated in England, its formal validity must be tested neither by the *lex loci actus* nor by the *lex domicilii* of the parties, but by English law as being the *lex situs*.

¹ Italics supplied.

³ [1927] 1 K.B. at p. 690.

² *Supra*, p. 492.

⁴ *Supra*, p. 231.

✓ *Essentials*. If the analogy between a contract and an assignment is justifiable,¹ it is difficult to appreciate why the established rule that refers the essential or material validity of a contract to the proper law should not apply to the transfer *inter vivos* of a *chose in action*. Yet a certain confusion of mind appears to distinguish the few authorities that have had to deal with the matter. A relevant decision is *In re Anziani*.²

Lex loci actus said to govern essentials

A married woman, domiciled in Italy, being entitled to certain moneys under a settlement drafted in the English language and form and the trustees of which were persons resident in the United Kingdom, made a voluntary assignment in Rome of part of the settlement funds to two trustees, both of whom resided in London. The assignment was void by Italian law since it did not comply with a requirement of the civil code, but the significant fact to observe is that this requirement was regarded by Italian law not as a mere matter of form, but as an essential element of the assignment.³

Thus the issue related to the essential validity of the assignment. Which law, Italian or English, was to govern this question of validity? Maugham J. chose Italian law. Having regard to the authorities, no serious objection can be raised to this if he did so on the ground that Italian law was the proper law of the assignment and was therefore appropriate to govern essentials, though it would seem more rational that the validity of a disposition of an interest in a trust, created under and subject to English law, should be tested by that law. The learned judge, however, chose Italian law as being the *lex loci actus*, and he based this decision upon the proposition of Scrutton L.J. in the Guatemalan case that the *lex loci contractus* governs formalities. Whether Scrutton L.J. was right or wrong, it was certainly not justifiable to tear his statement from its context and to extend it to the different question of essentials. It is only where the *lex loci contractus* happens also to be the proper law that it is entitled to govern essentials. Too much stress, however, need not be laid upon the exact wording of the judgment, for it is not, perhaps, unreasonable to regard Italian law as having been the proper law of the assignment.

It is impossible to remain uncritical of the judiciary after this perusal of the decisions in which the issue has been the validity and effect of assignments of debts. The impression gained is that there has been a retrogression to the days when the private international law of contracts was still inchoate and

Unsatisfactory state of the authorities

¹ *Lee v. Abdy* (1881), 17 Q.B.D. 309, 313; *supra*, p. 493, note 1.

² [1930] 1 Ch. 407.

³ [1930] 1 Ch. at p. 418.

undeveloped, days when it was common to find statements which laid excessive stress upon the *lex loci contractus*. The authorities just considered appear to rule that the actual place where the assignment of a debt is effected determines the law by which all disputes concerning the transaction are governed. This no doubt is a workable principle, but is it convenient, or indeed is it consistent with other principles germane to the subject? Let us test it by an example.

A, an Englishman, signs a contract at Lausanne by which he agrees to build an aeroplane at his Coventry works and to sell it to *B*, another Englishman resident in London, for £150,000. In these circumstances few would doubt that the capacity of the parties, the requisite formalities, and the validity and effect of the contract would be determinable by English law, except that compliance with the Swiss formalities would be sufficient though not essential. The next day, in the course of his homeward journey, *A* signs a document in Paris by which he purports to assign to *C*, a domiciled Scotsman, the debt of £150,000 that will ultimately become due from *B*.

Are we really to suppose that any dispute concerning the assignment is to be governed by French law? Is the fortuitous place of execution so significant? If *A* becomes involved in difficulties both with *B* and with *C*, difficulties that may possibly arise from the same event, is his legal position to be determined at one angle by English law and at another by the law of France? The suggestion is surely the negation of logic and common sense, and one that can scarcely survive the test of experience.

(*B*) *Questions dependent upon the nature of the right assigned.* The assignment of a debt may raise a question that cannot be answered without considering the legal effect of the transaction to which the debt owes its origin. In such a case it is imperative, if a satisfactory solution is desired, to be guided exclusively by the proper law of that transaction. Suppose, for example, to take an Illinois case, that:

A, employed by *B* in Indiana, makes in Illinois an assignment to *C* of all the wages earned or to be earned by him under his contract of employment. By the law of Indiana the assignment of future wages is prohibited, by the law of Illinois it is permissible. Is the purported assignment of the future wages effective?¹

In this case *A* has purported to assign a certain right of

¹ *Coleman v. American Sheet and Tin Plate Co.* (1936), Ill. App. 542; *Cheat-ham, Cases on Conflict of Laws* (3rd ed.), p. 631.

property. It is necessary, therefore, to examine the nature and attributes of this right, and for this purpose to refer back to the legal system under which it has arisen. Neither its content nor its characteristics can be altered merely because it has been the subject of a later transaction that in certain respects is subject to a foreign system of law. Such questions as whether the assignment is voidable for fraud or unenforceable for lack of a written memorandum are no doubt determinable by the law of Illinois, but the primary and fundamental question, whether the subject-matter is even capable of assignment, falls to be determined by the law of Indiana, the proper law of the contract of employment.

The proper law of the transaction under which a debt arose is also the only satisfactory legal system by which to determine the ranking of competing claimants where the creditor has made more than one assignment. A true question of priorities arises where there have been two or more valid assignments, the ranking of which is doubtful. This was not the case in *Republica de Guatemala v. Nunez*, since each of the successive assignments was for different reasons invalid. The assignment to Nunez was held to be void on several grounds, and a later assignment made to the Republic by Cabrera during his imprisonment in 1921 was rejected by the court on the ground of duress. In the result, therefore, the money deposited with the bank passed to the creditors of Cabrera.¹ A question of priorities, however, was raised in *Kelly v. Selwyn*,² where the facts were these:

What law governs question of priorities?

Kelly v. Selwyn

By an assignment executed in 1891 in New York, where he was then domiciled, X assigned to his wife his interest in certain English trust funds. Notice was not given to the trustees until twelve years later, since none was required by the law of New York. In 1894 X assigned the same interest to the plaintiff by a deed executed in England. Immediate notice of this was given to the trustees.

It was held that the plaintiff ranked first, since the rights of the claimant fell to be regulated by English law. Warrington J. said:

Proper law of subject-matter of assignment governs

"The ground upon which I decide it is that, the fund here being an English trust fund and this being the court which the testator may have contemplated as the court which would have administered that trust fund, the order in which the parties are to be held entitled to the trust

¹ *Republica de Guatemala v. Nunez* (1926), 95 L.J. (K.B.) 955.

² [1905] 2 Ch. 117; also in *Le Feuore v. Sullivan* (1855), 10 Moo. P.C. 1.

fund must be regulated by the law of the court which is administering that fund.¹

In an earlier passage the learned judge stressed the fact that he was 'administering an English trust fund, constituted by an English testator who may be taken to have made his will with the English law in his mind'.² The exact *ratio decidendi* is perhaps doubtful. The somewhat ambiguous language of the learned judge leaves it a little doubtful whether he chose English law as being the *lex fori*, or the *lex situs* or the proper law of the debt. According to Westlake³ and Scrutton L.J.,⁴ he treated the issue as one for the *lex fori*. It is submitted, however, that the decisive factor in the mind of the judge, if his language is considered as a whole, was that the subject-matter of the assignment consisted of a trust fund, the proper law of which was English law.⁵

Distinction
between
assignees
and
creditors

This view, that the proper law of the assigned debt is decisive in a question of competing assignees, is approved by some English writers⁶ and it prevails in German, Swiss and Scandinavian laws.⁷ This law also decides whether notice of an assignment must be given to the debtor or whether the assignee takes subject to equities. A possible objection to the claim of the proper law of the debt to govern priorities is the general rule that, in the administration of an estate by the court, as, for instance, upon bankruptcy or intestacy, the priority of creditors is determined by the *lex fori*.⁸ But assignees of a debt stand on a different footing from creditors in this respect. Where the bankruptcy court administers the English assets, the whole of which are under its control, chaos would result if, instead of adopting the English method of distribution among all creditors, whether foreign or not, it were required to incorporate other methods recognized by alien laws with which some of the debts might be connected. But equal chaos results if the *lex fori*, as such, is allowed to regulate the priority of assignees. If in *Kelly v. Selwyn* action had been brought by X's wife in New York, a judgment given according to the *lex fori* would have been in her favour. If the plaintiff had then sued in England, judgment would have been for him, not for the wife.

¹ Ibid., at p. 122.

² Ibid., at p. 121.

³ Westlake, s. 152.

⁴ *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669.

⁵ Morris, *Cases on Private International Law* (3rd ed.), pp. 341-2.

⁶ Dicey, p. 557; Wolff, p. 538; Graveson prefers the *lex situs*, op. cit., p. 254; also Schmitthoff, *The English Conflict of Laws* (2nd ed.), pp. 209-10.

⁷ Wolff, p. 538.

⁸ *Infra*, pp. 528-9.

Confronted with this conflict, the English court, being in control of a trust that was subject to English law, would not unnaturally prefer its own view of the respective rights of the parties. The dominating fact is, of course, that a dispute between competing assignees must of necessity be referred to one arbiter and to one only. This may be the *lex situs* of the debt or the proper law of the debt, as here advocated, but it cannot be that variable quantity, the *lex fori*.

(ii) *Involuntary assignments.*

The problem that affects private international law in the case of the involuntary assignment of a debt, as for instance where a customer's credit balance at a bank is vested by legislation in a custodian of enemy property,¹ is best illustrated by the process known as garnishment in England and by arrestment in Scotland and many other countries. This is a process by which a judgment creditor attaches a sum of money that is due to the judgment debtor from a third party, called the garnishee. If the necessary proceedings are taken the court may order that the garnishee shall pay the money direct to the judgment creditor.

In purely domestic proceedings, where the parties and the relevant transactions are connected solely with England, the garnishee is, of course, effectively discharged from further liability once he has paid the judgment creditor. The position, however, is not so straightforward in a case containing a foreign element, for a garnishee, having already complied with an order made in one country, will remain liable to pay his debt a second time if he is sued by the judgment debtor in a foreign court which refuses to recognize the validity of the order.² A debt is an item of property, the title to which is transferred by a garnishee order from one person to another, and the view taken by the English authorities is that such an order should be respected in other countries if, and only if, it has been made by the court of the country in which the debt is notionally situated, that is, the country where the debtor resides and therefore where effective proceedings for recovery of payment can be instituted.³ The discharge from further liability

¹ See e.g. *Arab Bank Ltd. v. Barclays Bank (Dominion, Colonial and Overseas)*, [1954] A.C. 495.

² *Martin v. Nadel*, [1906] 2 K.B. 26.

³ *In re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] Ch. 52, at p. 88.

that will be granted to him by the *lex situs* if he observes the order and pays the judgment creditor should be a good discharge everywhere. The leading case is *Swiss Bank Corporation v. Boemische Industrial Bank*.¹

The plaintiffs had recovered judgment for a large sum of money against the defendants, a company carrying on business exclusively in Czechoslovakia. The defendants kept an account at a London bank where their balance was over £9,000. The plaintiffs issued a garnishee summons against the bank.

It was objected that to make a garnishee order in these circumstances would be inequitable, since the bank, if sued later in Czechoslovakia, would probably be ordered to pay the sum over again to the defendants. The Court of Appeal nevertheless made the order in the confident belief that, having been made in the country where the debt was normally and properly recoverable, its validity and effect would not be repudiated in Czechoslovakia.

Priorities
also
governed
by *lex situs*

The *lex situs* of the debt which it is sought to attach determines, not only the question of jurisdiction, but also the effect of the garnishment as regards third parties. If, for example, an involuntary assignment occurs after a voluntary assignment has already been made, the *lex situs* determines whether the rights of the voluntary assignee have been postponed or defeated; if the involuntary assignment occurs first, the *lex situs* determines what rights, if any, the voluntary assignee has acquired. A question of priorities arose in the case of *In re Queensland Mercantile and Agency Co.*,² the facts of which were as follows:

The Union Bank of Australia held debentures issued by the Queensland Company charging the shares in that company that were not fully paid up. The bank was domiciled in England and the company in Queensland. After the capital had been called up, but before it was paid by the shareholders, who thus became debtors of the company, the X Company, domiciled in Scotland, began an action for negligence in Scotland against the Queensland Company, and immediately issued the Scottish process of arrestment against numerous shareholders who were domiciled in Scotland. The effect of this process according to Scottish law was to prevent the shareholders, pending a decision in the action of negligence, from paying the calls to the company.

The question that fell to be decided was whether the Union Bank, as debenture-holders, were entitled to be paid first out of the unpaid

¹ [1923] 1 K.B. 673.

² [1891] 1 Ch. 536; *affd.* [1892] 1 Ch. 219.

shares, according to the law of England and of Queensland, or whether the X Company, in accordance with the law of Scotland, had a prior right over the shares to the extent of the damages that they might be awarded in the action of negligence.

A question of priorities between two assignees was thus raised. The Union Bank contended that the question fell to be decided by the law of Queensland, since the Queensland Company was a creditor in respect of the unpaid shares and any assignment by it must be tested by the law of its domicile. North J., however, applied Scottish law. His reasoning was that since the debtors were resident in Scotland and therefore the unpaid calls which formed the subject-matter of the assignments were situated in that country, the assignments must rank in the order prescribed by Scottish law. He assimilated *choses in action* to tangible movables, asserting that an assignment of the latter class of property is governed by the *lex situs*.

It must finally be observed that whatever may be the proper law to govern the effect of an assignment, whether voluntary or involuntary, it is subject to the overriding rule that the *lex fori* governs all matters of procedure. This may have an important bearing upon the assignment of a debt. Suppose, for instance, that

Procedural
matters
governed
by the *lex
fori*

a Frenchman assigns by way of charge to another Frenchman a sum of money due from a French debtor, the assignment being made in France and according to the law of that country.

According to the rules of private international law, the assignment has universal validity. According to English domestic law, the assignment is valid, but the assignee cannot recover the money unless he makes the assignor a party to the action against the debtor. If this rule as to joinder of parties is to be regarded as a procedural rule for the purposes of private international law, a question which will be discussed later,¹ it must be obeyed in an action brought in England notwithstanding that it is not recognized by French law.

✓(b) *Negotiable instruments*²

If a transfer of a negotiable instrument has been made abroad and its validity is disputed in an English action, the court is confronted with a problem of choice of law. What the choice should be depends upon the manner in which the

Nature
of the
problem

¹ See *infra*, pp. 694 et seqq.

² See Falconbridge, *Conflict of Laws* (2nd ed.), pp. 341-57.

problem is analysed. It may be regarded as raising a question of form or interpretation to be governed by the Bills of Exchange Act, 1882; or as the transfer of a chattel, in which case the *lex situs* will be applicable; or as an assignment of a contractual right and therefore subject to the proper law of the contract. *Koechlin v. Kestenbaum*,¹ the latest decision on the matter, definitely treats the question as one of form or interpretation, and the doubt whether the Court of Appeal did not reach this conclusion by reading too much into the earlier authorities is one that can be resolved only by the House of Lords.

Trend of
authority
before Bills
of Ex-
change Act

The cases which were decided before the Bills of Exchange Act appear to show, on the whole, that the question was determined by that system of law which regulates the original contract of the maker or the acceptor, according as the instrument was a promissory note or a bill of exchange. On principle this would seem to be the correct solution, and it is the one which has been suggested in the analogous case of debts.² It was supported by Lush J. with great cogency in *Lebel v. Tucker*.³ A bill, which was drawn, accepted and payable in England, had been indorsed in France, and in an action brought here by the indorsee against the acceptor, the question was whether the validity of the indorsement fell to be determined by English or by French law. The decision was in favour of English law.

Inland
bills

'Now,' said Lush J., 'the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: He says: "Pay a certain sum at a certain date to my order." The acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is: "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England?'⁴

Later he added:

'So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation

¹ [1937] 1 K.B. 899; *infra*, pp. 505-7.

² *Supra*, pp. 496-9.

³ *Lebel v. Tucker* (1867), L.R. 3 Q.B. 77. To the same effect was *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385.

⁴ *Lebel v. Tucker*, *supra*, at p. 84.

and negotiation in a foreign country of the instrument by which the contract is constituted.¹

This case dealt with an inland bill,² but there were others decided before the Bills of Exchange Act which applied the same principle to the negotiation of foreign bills.³

This principle, that the transfer of a negotiable instrument was governed by the 'proper law' of the acceptance or making, was abandoned for foreign bills by the majority of the Court of Common Pleas in the case of *Bradlaugh v. De Rin*,⁴ where

a bill of exchange, which had been drawn in France and accepted by defendant in England, was negotiated by a blank indorsement made in France.

Assuming that the indorsement was formally invalid by French law, the majority of the court held that the acceptor was free from liability, on the ground, it is generally said, that the indorsement of a foreign bill is governed by the law of the place not where the bill is accepted, but where the indorsement is made.⁵ The case was reversed by the Exchequer Chamber,⁶ but simply on a question of fact, for it appeared that the indorsement was valid even by French law.

It may be said, then, that except for the judgment of the Court of Common Pleas in *Bradlaugh v. De Rin* the stream of authority down to the Bills of Exchange Act, 1882, shows a marked tendency to determine the validity of an indorsement by the law which governs the original contract of the acceptor or maker.

The relevant sections of the Bills of Exchange Act are as follows:

'72. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined

¹ *Ibid.*, at pp. 85-86.

² i.e. one both drawn and payable within the British Isles, or drawn within the British Isles upon some person resident there. Any other bill is a foreign bill; Bills of Exchange Act, 1882, s. 4.

³ *Trimbey v. Vignier* (1834), 1 Bing. N.C. 151; *In re Marseilles Extension Co.* (1885), 30 Ch.D. 598.

⁴ (1868), L.R. 3 C.P. 538, Montague Smith J. dissenting.

⁵ Westlake, s. 228; Sargant L.J. in *Koechlin et Cie v. Kestenbaum*, [1927] 1 K.B. 889, at p. 898. The truth would appear to be that French law was applied because the bill was drawn in France.

⁶ (1870), L.R. 5 C.P. 473.

by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement or acceptance *supra protest*, is determined by the law of the place where such contract was made. Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.¹
 - (b) Where a bill issued out of the United Kingdom conforms as regards requisites in form to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill is determined by the law of the place where such contract is made.²

Effect of
the Act on
case law

The question now is whether these sections are concerned with the subject of transfer at all, and whether it is possible to ascertain from them the legal system that determines the validity and effect of an indorsement, or of a delivery, of a negotiable instrument.

There have been only three relevant cases since the Act.² The first of these was *Alcock v. Smith*.³

*Alcock v.
Smith*

Alcock v. Smith. A bill of exchange, drawn by and upon English firms, and payable in England to the order of X, was indorsed and delivered in Norway by X to Y. While in the hands of Y it was seized by a judgment creditor in Norway, and in the due course of Norwegian law was ultimately sold by public auction to Z. Owing to facts which have been omitted from the above statement, Z had no title to the bill by English law, but according to Norwegian law the property duly passed to him as a result of the sale. In the action subsequently brought in England, it was held that the effect of the transactions in Norway must be governed by Norwegian law, and therefore that the title

¹ It is also enacted by the Finance Act, 1933, s. 42, that a bill of exchange which is presented for acceptance, or accepted, or payable, outside the United Kingdom shall not be invalid by reason only that it is not stamped in accordance with the law for the time being in force relating to stamp duties. Such bill may be received in evidence on payment of the proper duties and penalties under the Stamp Act, 1891, ss. 14, 15 (1). This is designed to give effect to the convention on Stamp Laws, 1930; see Cmd. 4594.

² *Alcock v. Smith*, [1892] 1 Ch. 238; *Embircos v. Anglo-Austrian Bank*, [1904] 2 K.B. 870; [1905] 1 K.B. 677; *Koechlin v. Kestenbaum*, [1927] 1 K.B. 616; reversed, [1927] 1 K.B. 889.

³ *Supra*.

NEGOTIABILITY



acquired thereunder by Z must prevail over one which by English law would have been stronger.

The judgments paid little heed to the statutory provisions, but in general adopted the view that Norwegian law applied because it was the *lex loci actus*. Romer J., indeed, held that the word 'interpretation' in sub-section (2) was wide enough to cover the 'legal effect' of a contract and that therefore statutory effect had been given to the principle of the *lex loci actus*. In the Court of Appeal, however, no reliance was placed upon the Act.

The facts of the second case, *Embiricos v. Anglo-Austrian Bank*,¹ were these:

*Embiricos
v. Anglo-
Austrian
Bank*

Embiricos v. Anglo-Austrian Bank. A cheque on a London bank was drawn in Romania in favour of the plaintiffs, who specially indorsed it there to a firm in London and placed it in an envelope addressed to that firm. The cheque was stolen from the envelope in Romania by a clerk of the plaintiffs. Three days later the cheque, bearing an indorsement which purported to be that of the London firm but which was in fact a forgery, was presented for payment at a bank in Vienna. The Vienna bank cashed the cheque in good faith, indorsed it to the defendants, who were their London agents, and the latter collected the amount from the bank upon which the cheque was drawn. Plaintiffs then sued defendants in damages for conversion. The Austrian law was that, notwithstanding the theft and forgery, the Viennese bank acquired a good title to the cheque. Judgment for defendants.

In this case the title which was acquired under the law of the country where the instrument was situated at the time of the transaction was upheld by the English court.

Again Austrian law was chosen as being the *lex loci actus* (though perhaps what was in the mind of the court was the *lex situs*, since this necessarily coincided with the *lex loci actus*),² and again the judgments attributed only trifling importance to the Act. Romer L.J. thought that section 72 (2) recognized the *lex loci actus* as being applicable to the matter, an opinion which Walton J. was prepared to share if 'interpretation' includes 'legal effect'. Vaughan Williams L.J. was not clear that the sub-section covered the case, but according to Stirling L.J. its applicability was worthy of serious consideration.

*Little
effect in
Embiricos
v. Anglo-
Austrian
Bank*

Section 72, which, it will be observed, was only a secondary consideration in these two decisions, played, however, a decisive part in *Koechlin v. Kestenbaum*,³ which is the most recent case on the subject.

*Decisive
effect in
Koechlin
v. Kesten-
baum*

¹ [1904] 2 K.B. 870; [1905] 1 K.B. 677.

² *Supra*, p. 473.

³ [1927] 1 K.B. 616; reversed, [1927] 1 K.B. 899.

In that case a bill of exchange was drawn in France by *X* upon the defendants in London to the order of *Y*, who was *X*'s father. It was accepted, payable in London, by the defendants. The bill was indorsed not by the payee, *Y*, but by *X*, and was then transferred for value to the plaintiffs in France. *X*'s indorsement was affixed on behalf of, and with the authority of, *Y*. Upon presentment the defendants refused payment, on the ground that the bill did not bear the signature of *Y* by way of indorsement.

English law requires that a bill payable to order shall be indorsed by the payee, or by an agent who expressly signs *per pro* the payee. French law, however, permits a valid indorsement to be made by an agent in his own name, provided that he so acts with the authority of the payee.

Therefore, whether the plaintiffs were entitled to payment depended upon whether the validity of the indorsement was to be determined by English or by French law.

Rowlatt J.¹ held that the indorsement was governed by English law, but his decision was reversed by the Court of Appeal.²

Bankes L.J. held that the proper law to govern the validity of a transfer had been definitely settled by the Bills of Exchange Act, section 72, in favour of the *lex loci actus*. In his opinion this legal system was deliberately applied by the Court of Appeal in the *Embiricos Case* long after the passing of the Act. The bill, he said, was drawn and indorsed in France in a form recognized by French law, and therefore it became valid in England by virtue of sub-section (1) of section 72.³

Sargant L.J. agreed, the essence of his judgment being contained in the following words:

'In my judgment the question whether this bill could properly be indorsed in the name of the payee only, or could rightly be indorsed by the son in his own name, if he had authority in fact to do so, is purely a question of form and is therefore covered in terms by s. 72, sub-s. (1); but if it is not covered by that sub-section it is covered by sub-s. (2), in view of the very wide effect of the decision in *Embiricos v. Anglo-Austrian Bank*. . . . If the indorsement in fact made is, according to the law of the place where it is made, sufficient to give a title to the indorsee, it appears to me that by the express terms of the Act the indorsee is entitled to sue. The effect is not to increase the liabilities of the acceptor, but merely to enlarge the methods by which the right to enforce those liabilities can be transferred by the person originally entitled to them to some subsequent indorsee.'

Avory J. expressed his agreement with the reasons thus given. This case is a definite authority in favour of the *lex loci actus*,

¹ [1927] 1 K.B. 616.

² [1927] 1 K.B. 889.

³ *Supra*, pp. 503-4.

though it is remarkable that it attributes to the judges who decided *Embiricos v. Anglo-Austrian Bank* a confidence in the applicability of the Bills of Exchange Act that is not very apparent from their judgments.

In finally stating the law with regard to the transfer of negotiable instruments we must first deal with the separate and special case of an inland bill of exchange. Summary
of present
law

An 'inland bill' is one which is both drawn and payable within the British Isles, or one which is drawn within the British Isles upon some person resident there.¹ It is expressly provided by the Bills of Exchange Act, 1882,² that when such a bill is indorsed in a foreign country, the indorsement shall, *as regards the payer*, be interpreted according to the law of the United Kingdom. This confirms the decision in *Lebel v. Tucker*,³ and means that the acceptor of an inland as contrasted with a foreign bill is liable only to holders who claim under an indorsement valid by English law. The enactment, however, is expressly confined to the liability of the payer. Inland
bills

Secondly, we must contrast the transfer of a foreign bill, i.e. one which does not satisfy the definition given in the preceding paragraph. The rule here is that whether a transfer is valid or not is determined by the law of the place where the transfer is effected, i.e., in the words of the Act, 'where such contract is made'.⁴ This rule applies equally to a promissory note and to a cheque.⁵ The position was thus stated by Sargant L.J. in *Koechlin v. Kestenbaum*:⁶ Foreign
bills

'The decision of the Court of Common Pleas [in *Bradlaugh v. De Rin*'] drew a marked distinction between a foreign bill, such as was there in question, and an inland bill, such as was being dealt with in *Lebel v. Tucker*,⁸ and it seems to me that the Legislature in 1882 adopted that view, and drew the marked distinction which had been thus recognized. . . . The result was that any one dealing with a foreign bill of exchange was in a less certain position than a person dealing with an inland bill, because in the case of an indorsement abroad on a foreign bill he might find substituted for the person to whom he was originally liable as acceptor, not merely a person to whom the transfer would have been good if made in England, but a person to whom the transfer by

¹ Bills of Exchange Act, 1882, s. 4.

² S. 72 (2) proviso.

³ (1867), L.R. 3 Q.B. 77; *supra*, p. 502.

⁴ Bills of Exchange Act, 1882, s. 72 (1) (2); *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K.B. 870; [1905] 1 K.B. 677; *Alcock v. Smith*, [1892] 1 Ch. 238; *Koechlin v. Kestenbaum*, [1927] 1 K.B. 889.

⁵ *Embiricos v. Anglo-Austrian Bank*, *supra*.

⁶ [1927] 1 K.B. at p. 898.

⁷ *Supra*, p. 503.

⁸ *Supra*, p. 502.

indorsement would be good if made according to the law of the country in which it was made. That is rendered perfectly clear by s. 72, sub-ss. (1) and (2), of the Act. The matter was carried probably further than was contemplated by the actual language of the sub-sections by the decision in *Embiricos v. Anglo-Austrian Bank*.¹

The result of this distinction is scarcely satisfactory to the commercial world, but it certainly shows how important it is that as wide a unification as possible of the internal laws relating to negotiable instruments should be effected.

(c) Shares

Importance
of place
where
register
kept

A share of stock is intimately connected with the place where the issuing company has its residence, since the general rule is that it can be effectively transferred only by a substitution of the name of the transferee for that of the transferor in the register of shareholders. This register is normally kept by the company at its principal place of business, though there may be branch registers in other countries for the purpose of recording transactions that are effected there.¹ Despite the fact that a share is generally represented by a certificate which may be pledged and otherwise dealt with as a document of value, it still remains true that by English law entry on the register constitutes, and alone constitutes, legal ownership. The rule of private international law is that shares are deemed to be situated in the country where they can be effectively dealt with as between the shareholder and the company. In other words, shares which are transferable only by an entry in the register are deemed to be situated in the country where the register or branch register is kept.² If a company keeps registers in two or more countries, in any of which transfers may be registered, the question where any particular shares are situated depends upon the country in which according to the ordinary course of business the transfer would be registered.³

¹ For instance, the Companies Act, 1948, s. 119, provides that an English Company may keep a branch register (called a dominion register) in any of Her Majesty's dominions for members there resident. No transaction affecting shares so registered must be registered in any other register; s. 120 (4).

² *London & South American Investment Trust v. British Tobacco Co. (Australia)*, [1927] 1 Ch. 107; *Brassard v. Smith*, [1925] A.C. 371; *Erie Beach Co. v. A.-G. for Ontario*, [1930] A.C. 161; *Baelz v. Public Trustee*, [1926] Ch. 863; *R. v. Williams*, [1942] A.C. 541.

³ *R. v. Williams*, *supra*; *Treasurer of Ontario v. Blonde and Others*, [1947] A.C. 24.

A question of choice of law may arise with regard to a transfer of shares. Foreign companies, for instance, frequently issue certificates which, according to the legal system that governs the incorporation of the company, can be transferred in such a manner that, even prior to registration, the transferee acquires, as against the transferor, both the legal and the equitable title to the shares. If, in such a case, the certificate is transferred in a country other than that in which the register of shareholders is kept, it becomes important to ascertain the country whose law will determine the validity and effect of the transfer.

English law is not doubtful in this matter. The effect of such a transfer may require consideration from two entirely different aspects, namely, first, its effect as against the company, and secondly, its effect as regards the parties to the transfer and persons claiming under them.

Questions of the first type are determined by the *lex situs* of the shares.

Rule where
certificates
transferred
in other
places

If, for instance, the certificates of a company incorporated in New York have been transferred in England, New York law must decide whether the mode in which the transfer has been effected entitles the transferee to be registered as a shareholder. The corporate rights of the transferee depend entirely upon that law.

Effect of
transfer as
against the
company

The second type of question, on the other hand, is determined by the proper law of the transaction, which in practically all cases will be the law of the place where the certificate has been delivered.

Effect of
transfer as
between
the parties

'On principle the transfer of the certificate is governed by the *lex situs* of the certificate at the material time, and the transfer of the shares is governed by the *lex situs* of the shares, and consequently if the certificate is transferred in country *X*, and the share registry office is situated in country *Y*, the law of *X* may give to the transferee of the certificate the property in the certificate (*jus in re*) and a right to registration as shareholder (*jus ad rem*), but the enforcement of his right to registration as shareholder and the vesting in him of the title to the share (*jus in re*) are subject to the law of *Y*.¹

Thus, to take the illustration of the New York company given above, the question whether the transferee is entitled by virtue of the transaction to retain the certificates as against the transferor must be determined by English law. If English law decides in favour of the transferee, then, whether he can demand to be registered as a shareholder is a matter for American law.

¹ Falconbridge, op. cit., pp. 590-1.

*Colonial
Bank v.
Cady*

The authority for these rules is *Colonial Bank v. Cady*.¹

The executors of a deceased Englishman, owner of certain American railroad shares, who desired to be registered as owners in the books of the company, sent the certificates to London brokers for transmission to America. Upon the request of the brokers the executors signed the certificates in blank. The brokers deposited the certificates with the Colonial Bank as security for a debt, and later became bankrupt.

The question whether the deposit conferred a legal title upon the bank depended upon whether the transaction was to be governed by English or by American law. By English law no title passed, but by American law the delivery of the certificates operated to vest in the bank both the legal and the equitable ownership of the shares. It was held that, as the deposit was made in England, its effect must be determined by English law.

'I agree,' said Lord Herschell, 'that the question, what is necessary or effectual to transfer the shares in such a company, or to perfect the title to them, must be answered by a reference to the law of the State of New York. But I think that the rights arising out of a transaction entered into by parties in this country, whether, for example, it operated to effect a binding sale or pledge as against the owner of the shares, must be determined by the law prevailing here.'²

In the court below, Bowen L.J. simplified the problem with terse felicity:

'The key to this case is whether the defendants [the bank] have a right to hold these pieces of paper, these certificates. What the effect upon their ulterior rights in America would be, if we were to declare that they were entitled to these pieces of paper, is another question.'³

(B.) UNIVERSAL ASSIGNMENTS OF MOVABLES

(I.) BANKRUPTCY⁴

1. *Jurisdiction of English courts*

Two
essentials

Two conditions must be satisfied before an English court can exercise bankruptcy jurisdiction over a person: first, the person must have committed an 'act of bankruptcy' within the meaning of the Bankruptcy Act, 1914; and secondly, he must be a 'debtor' as defined by the same statute.

¹ (1890), 15 App. Cas. 267; in the Court of Appeal, *sub nom. Williams v. Colonial Bank* (1888), L.R. 38 Ch.D. 388.

² 15 App. Cas. at p. 283.

³ (1888), 38 Ch.D. at p. 408.

⁴ For a more detailed account of this topic see Blom-Cooper, *Bankruptcy in Private International Law*.

It is not within our province to enumerate the eight facts any one of which constitutes an act of bankruptcy, but it is instructive to notice that some of them comprise acts which may occur in a foreign country. Thus it is enacted that a debtor commits an act of bankruptcy in the following cases:

- (a) If in England *or elsewhere* he makes an assignment of his property to a trustee for the benefit of his creditors generally.
- (b) If in England *or elsewhere* he makes a fraudulent conveyance of his property.
- (c) If in England *or elsewhere* he makes any conveyance which is void as a fraudulent preference.
- (d) If he departs *out of England*, or, *being out of England*, he remains *out of England*, or departs from his dwelling-house or otherwise absents himself with intent to defeat or delay his creditors.¹

With regard to the first of these acts, however, it has been held that an assignment of property made by a domiciled foreigner in his own country and which is intended to operate according to the law of that country is not an act of bankruptcy within the meaning of the statute.²

The definition of the term 'debtor' in connexion with bankruptcy was considerably widened by the Bankruptcy Act, 1913,³ in a section which has been reproduced in the present Act.⁴ Before 1913 it was held that the existing bankruptcy legislation was applicable only to British subjects, or to foreigners who, by residence in the country, brought themselves within the allegiance of the Crown.⁵ Legislation is *prima facie* territorial, and it was therefore established that bankruptcy jurisdiction could not be invoked against a foreigner unless the act of bankruptcy had been committed personally by him in England.⁶ The result was that a foreign merchant who, without ever coming to England, carried on a branch of his business here through an agent, was immune from the jurisdiction.⁷ The law, however, was altered by the statute of 1913, and the rule since then has been that a foreign national domiciled abroad may be susceptible to English proceedings

1. Act of bankruptcy

2. Debtor

¹ Bankruptcy Act, 1914, s. 1 (1). Italics supplied.

² *Ex parte Crispin* (1873), L.R. 8 Ch. 374, 380; *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102; *In re Debtors*, [1936] Ch. 622.

³ 3 & 4 Geo. V, c. 34, s. 8.

⁴ Bankruptcy Act, 1914, s. 1 (2).

⁵ *Ex parte Crispin* (1873), L.R. 8 Ch. 374; *Ex parte Blain* (1879), L.R. 12 Ch.D. 522; *In re Pearson*, [1892] 2 Q.B. 263.

⁶ *Ex parte Blain*, *supra*, at pp. 526, 528.

⁷ *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102.

even in respect of an act of bankruptcy committed abroad, as for example by remaining out of England with intent to defeat his creditors.¹ The relevant section of the present Act provides that the expression 'a debtor' includes any person, whether a British subject or not, who at the time when any act of bankruptcy was committed by him,

- Bank-
ruptcy Act,
s. 1 (2)
- (a) was personally present in England; or
 - (b) ordinarily resided or had a place of residence in England; or
 - (c) was carrying on business in England, personally or by means of an agent or manager; or
 - (d) was a member of a firm or partnership which carried on a business in England.²

Bank-
ruptcy Act,
s. 4 (1) (d)
restricts
proceedings
by creditors

A debtor who has traded in England is deemed to be 'carrying on a business in England' even after he has left the country, until all debts due in respect of the trading have been paid.³

It will be observed that this enactment, if it stood alone, would enable bankruptcy proceedings to be taken against a foreigner who committed an act of bankruptcy while on a merely transient visit to this country. Proceedings might also be taken if a foreigner, who happened to have a place of residence in England, were to commit an act of bankruptcy abroad. But since it would be undesirable to assume jurisdiction in such cases, the definition of debtor has been qualified by section 4 (1) (d). This section distinguishes bankruptcy proceedings initiated by the debtor himself from those initiated by a creditor, and it imposes further conditions applicable to the latter case only. It provides that:

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless the debtor is domiciled in England, or *within the last year* has ordinarily resided or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Northern Ireland or a firm or partnership having its principal place of business in one of those two countries) has carried on business in England personally or by means of an agent or manager, or (except as aforesaid) is, or within the last year has been, a member of a firm or partnership which has carried on business in England by means of a partner, agent or manager.⁴

¹ *Theophile v. Solicitor-General*, [1950] A.C. 186. On this case see Blom-Cooper, *op cit.*, pp. 72 et seqq.

² Bankruptcy Act, 1914, s. 1 (2).

³ *Theophile v. Solicitor-General*, *supra*.

⁴ Bankruptcy Act, 1914, s. 4 (1) (d).

The relation between sections 1 (2) and 4 (1) (d) seems reasonably clear.¹ Having first ascertained that the person against whom the jurisdiction is invoked is a 'debtor' within the meaning of the earlier section, the creditor must then have regard to the qualifications of that section introduced by 4 (1) (d).

A foreigner, for instance, not engaged in business, who fraudulently preferred one of his creditors while on a visit to London, would be immune from the bankruptcy jurisdiction of the English court, unless he was domiciled in England or within the last year had ordinarily resided in that country.

Again, a Scottish merchant, even though covered by section 1 (2) because trading in England through an agent, would be equally immune in the absence of an English domicil or residence.

The jurisdiction of the court is, however, wider when it is the debtor himself who initiates proceedings by the presentation of a bankruptcy petition. Such a petition is in itself an act of bankruptcy,² and nothing more is required to found jurisdiction than that the petitioner should be a 'debtor' within the meaning of section 1 (2).

If the above conditions have been satisfied, the English court is not deprived of jurisdiction merely because bankruptcy proceedings have been initiated in a foreign country.³ The Court of Bankruptcy has a discretion to refuse jurisdiction if an inequitable use is being made of the English statute,⁴ but the existence of similar proceedings abroad is not of itself a valid reason for a refusal to exercise jurisdiction here. Jurisdiction, however, will be refused where an adjudication would be useless and embarrassing, as, for instance, where proceedings have been started abroad and there are no assets in England.⁵ The principle that English jurisdiction is not ousted by the mere existence of foreign proceedings would seem to apply, not only where the debtor himself has set the foreign court in motion, but also where the creditors have started proceedings abroad; though it must be observed that Warrington L.J. has suggested that there is a stronger ground for the ouster in the latter case.⁶

The matter just discussed brings us to the vexed question of concurrent bankruptcies.⁷ It is a matter of common occurrence

Debtor's
bankruptcy
petition

Bank-
ruptcy
proceedings
abroad no
bar to
English
jurisdiction

Concurrent
bank-
ruptcies

¹ As to the interaction of the statutory provisions see 12 M.L.R. 462 et seqq. (Dr. K. Lipstein).

² Bankruptcy Act, 1914, s. 1 (1) (f).

³ *In re McCulloch* (1880), 14 Ch.D. 716; *In re a Debtor*, [1922] 2 Ch. 470; *In re a Debtor*, [1929] 1 Ch. 362, 370.

⁴ *In re McCulloch*, *supra*, at p. 719. ⁵ *In re Robinson* (1883), 22 Ch.D. 816.

⁶ *In re a Debtor*, [1922] 2 Ch. at p. 474. ⁷ See Westlake, pp. 162-71.

for a debtor to be made bankrupt in more countries than one, and when this happens it is clear that there must inevitably ensue not only considerable injustice and confusion, but also undue expense. The law of bankruptcy varies in different countries. Thus debts provable in one country may not be admissible of claim in another, the rules dealing with priority of creditors may differ, there may be no common agreement as to the date when the bankruptcy of a debtor is deemed to commence, and what constitutes an act of bankruptcy in one country may be innocuous in another. Quite apart from these differences in the substantive law of the various territorial systems, the inconveniences of co-existing bankruptcies are patent. The bankrupt, for instance, at his pleasure can remove his property and arrange for its distribution in one particular country, so that creditors will be compelled to calculate whether it is more advantageous to proceed in this or in that forum.¹

Three
courses
possible in
event of
concurrent
bank-
ruptcies

It is virtually impossible to prevent the initiation of bankruptcy proceedings in various countries, for there is invariably an overriding territorial rule that proceedings may be taken against a debtor in given circumstances, but the real problem is whether the different administrative bodies should co-operate with each other. The question arises when an application is made to an English court for the stay of proceedings in England on the ground that similar proceedings have been started abroad. In such a case there are three possible solutions:²

(a) *Submission to the forum of the domicil.*

(a) Doc-
trine of
the unity
of bank-
ruptcy

Jurists have consistently advocated the doctrine of the unity of bankruptcy.

'As the bankruptcy has in view an adjustment of the claims of a number of creditors, it is possible only at one place, namely, at the domicil of the debtor. . . .'³

'Another rule', said Fry L.J.,⁴ 'which has been suggested is this, that every other *forum* shall yield to the *forum* of the domicil, that the *forum* of every foreign country, every country not of the domicil, shall act only as accessory and in aid of the *forum* of the domicil. That, it is said, is the *forum concursus*, to which all persons who are interested in the administration of the estate are bound to have recourse.'

¹ See Mr. Chancellor Kent in *Holmes v. Rensen* (New York), cited Piggott, *Foreign Judgments* (2nd ed.), p. 337.

² *In re Artola Hermanos* (1890), 24 Q.B.D. 640, at p. 648, *per* Fry L.J.

³ Savigny, s. 374, transl. Guthrie, p. 209.

⁴ *In re Artola Hermanos*, *supra*, at p. 648.

Under such a system the administrator in the country of the domicile would seek the co-operation of administrators in every other country, so that the assets wherever situated would be removed to the domicile, where creditors of all countries would have to appear. Such co-operation, which was formerly recognized on the Continent, is not common at the present day.¹ The obvious objection to it is that the domicile may not be the place where the debtor has carried on his main business or where his assets are mostly situated.

The doctrine of unity is certainly no part of English law. Though the theoretical convenience of submitting to the forum of the domicile has been judicially admitted,² there is not a single case in which the court has stayed bankruptcy proceedings in England on that ground alone. There is, no doubt, jurisdiction to do so, but it is a jurisdiction which will not be exercised unless there is some other weighty reason, such as the absence of assets in England, for taking so drastic a step. On the other hand, the court has a general jurisdiction to sanction an agreement between an English and a foreign trustee in bankruptcy, providing for the pooling of all assets and for their rateable distribution between the English and foreign creditors.³

Unity
of bank-
ruptcy not
recognized
in England

Again, the Bankruptcy Act, 1914, provides that all British courts, wherever situated, shall act in aid of and be auxiliary to each other.⁴ If one British court requests the aid of another, the latter may exercise such jurisdiction as either court could exercise in its own country with regard to similar matters.

(b) *Submission to the country in which proceedings are first started.*

This rule of priority, which is that proceedings later in time must be used merely to assist the distribution of the estate by the administrator first appointed, has been described as the only logical conclusion to be drawn from the existing practice,⁵ but it has found no favour with English judges.⁶ If there is to be one principal administration, it ought to be either in the place where the assets are chiefly situated, or, in the case of a trader, in the place where the debtor has his chief business establishment, neither of which facts may be true of the country in which proceedings are first started.

(b) Doc-
trine of
priority

¹ Westlake, p. 163.

² *In re Artola Hermanos*, *supra*, per Lord Coleridge, at p. 645.

³ *In re P. Macfadyen & Co.*, [1908] 1 K.B. 675.

⁴ S. 122.

⁵ Piggott, *Foreign Judgments* (2nd ed.), p. 337.

⁶ *In re Artola Hermanos* (1890), 20 Q.B.D. 640, at p. 649.

(c) *Separate independent bankruptcies in each jurisdiction.*

(c) Doctrine of plurality This is the principle to which English law is committed. The court, if once put in motion, administers such assets as are situated in England according to the rules set out in the Bankruptcy Act, without regard to administrations that may be in progress in other countries, though it recognizes the claims of all creditors, foreign as well as English.¹ This does not mean, however, that the status of a foreign trustee in bankruptcy is disregarded. Though English law neglects the doctrine of unity it recognizes the doctrine of universality, that is, as we shall see below, it admits that the title of a foreign trustee extends to such movables of the debtor as are found in England, provided that no bankruptcy proceedings have been begun within the jurisdiction.

Winding-up of foreign companies. It is convenient here to consider the jurisdiction of English courts to wind up foreign companies.²

Difficulties arising from dissolution of Russian companies Normally there can be no question of a foreign company being wound up in England, for its extinction, no less than its birth, is a matter solely for the law of the country in which it has been incorporated. Once dissolved according to this law it necessarily becomes a non-existent person in the eyes of the common law. As such, it can no longer sue or be sued or wound up, it cannot acquire rights or incur liabilities, and such assets as it possesses in England pass to the Crown as *bona vacantia*.³ These disabilities, the inevitable consequences of inexistence, became of great importance after the Bolshevik revolution of 1917, for many of the Russian companies, particularly banking corporations, which had suffered dissolution and the confiscation of their assets at the hands of the Soviet authorities, continued to transact business at their branches in England. Such a branch represented what Maugham J. once expressively described as,

'a submerged wreck floating on the ocean of commerce'.⁴

¹ So also in the case of concurrent liquidations of a company. Although the court will as far as practicable act as ancillary to the main liquidation, it will never 'give up the forensic rules which govern the conduct of its own liquidation', *In re English, Scottish, and Australian Chartered Bank*, [1893] 3 Ch. 385, 391, per Vaughan Williams J.; *In re Suidair International Airways Ltd.*, [1951] Ch. 165.

² This discussion owes much to the following articles written by Mr. Michael Mann: 15 *M.L.R.* 479-83; 18 *M.L.R.* 8-32; 21 *M.L.R.* 95-96; 3 *J. & C.L.Q.* 689-92; 4 *J. & C.L.Q.* 226-8.

³ *In re Wells* (Sir Thomas Spencer), [1933] Ch. 29.

⁴ *In re Russian Bank for Foreign Trade*, [1933] Ch. 745, 764.

At common law, debts due to or from the branch were irrecoverable, since it had no *locus standi* in the courts; its assets were neither distributable by a liquidator among creditors nor liable in respect even of transactions effected in England after and perhaps in ignorance of the dissolution, though the agent who had acted for this non-existent principal would no doubt be personally liable.

The cure for these ills, however, is to be found in the provisions of the Companies Act, 1948, which govern the winding-up of unregistered companies. The section now in force, i.e. section 399 (5) (A), provides that any unregistered company may be wound up at the discretion of the court, if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.¹ The expression 'unregistered company' includes *inter alia* 'any partnership, whether limited or not, any association and any company', but not, of course, a company registered in the United Kingdom or a limited partnership registered in England or Northern Ireland.² The expression is thus given a comprehensive meaning, and it includes 'countless cases of partnerships, associations and companies which are merely names for groups of individuals and which are not corporations at all'.³ It does not refer in terms to foreign corporations, but nevertheless it is well settled that they may be wound up under the statutory provisions.⁴ The Act expressly provides that an unregistered company may be wound up if it *is dissolved*,⁵ and since these words have been construed as equivalent to *has been dissolved*,⁶ it follows that the English branch of a Russian bank dissolved many years ago is subject to this particular jurisdiction of the High Court upon the petition either of the branch itself or of a creditor.

Statutory
power to
wind up
foreign
companies

In order to invoke the jurisdiction conferred by section 399 (5) (A) of the Act, it is not necessary to show that the dissolved company had established a definite branch or place of business in England.⁷ Since the object of the section is to

¹ The corresponding section in the Act of 1929 was 338 (1) (d).

² Companies Act, 1948, s. 398.

³ *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405, 432, *per* Lord Russell of Killowen.

⁴ *In re Commercial Bank of South Australia*, [1892] 2 Ch. 204.

⁵ Companies Act, 1948, s. 399 (5) (A).

⁶ *Re Family Endowment Society* (1870), L.R. 5 Ch. 118, 136.

⁷ *Banque des Marchands de Moscou v. Kindersley*, [1951] Ch. 112; *In re Azoff-Don Commercial Bank*, [1954] Ch. 315.

provide machinery whereby any assets found in the country may be collected and distributed among the creditors, it follows that the existence of such assets, which at any rate implies the carrying-on of business in some sense of the term, is sufficient to justify the making of a winding-up order.

Companies
Act, 1948
s. 400

The difficulties caused by the revolutionary legislation in Russia prompted the insertion of an additional section in the Companies Act, 1929, which now appears as section 400 in the Act of 1948.¹ It is to this effect:

Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of the Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

The prevalent view is that the section merely confirms a jurisdiction that has long existed and removes any possible doubts as to its exercise in the case of such associations as the Russian banks.² In particular, its reference to 'carrying on business' in Great Britain imposes no limitation upon the general jurisdiction conferred by section 399 (5) (A).³ In effect the words only indicate that some assets upon which a winding-up order can operate must be found in Great Britain.

Reviv-
ification of
company
for pur-
poses of
winding-up

This spectacle of winding-up an extinct entity is bound to disturb the logician. He may justifiably ask several questions. How can you liquidate a body that has already been annihilated, unless it has been expressly reanimated by the Act, which is not in fact the case? Since all the assets of a dissolved corporation pass to the Crown as *bona vacantia*, what remains to be distributed among the creditors? Who are the creditors, what are the debts, for it is well settled that debts due to or from a corporation are extinguished on its dissolution?⁴ In the leading case of *Russian and English Bank v. Baring Brothers & Co.*,⁵ the House of Lords by a bare majority⁶ surmounted these difficulties by holding that a dissolved company is implicitly

¹ The corresponding section in the Act of 1929 was 338 (2).

² *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405, at p. 424, per Lord Atkin.

³ *Banque des Marchands de Moscou v. Kindersley*, [1951] Ch. 112, 131.

⁴ 1 Blackstone's Commentaries, p. 484, cited in *In re Higginson & Dean*, [1899] 1 Q.B. 325, 330.

⁵ [1936] A.C. 405.

⁶ Lords Blanesburgh, Atkin, and Macmillan.

revivified by the Act for winding-up purposes. In the words of Lord Atkin:¹

'The legislature has provided that a dissolved foreign corporation may be wound up in accordance with the provisions of the Companies Act. The provisions of the Companies Act as to winding-up are only applicable to corporations which are in existence. Are we to say that the legislative enactment is completely futile: or is there another solution? My Lords, I think that we are entitled to imply, indeed I think it is a necessary implication, that the dissolved foreign company is to be wound up *as though it had not been dissolved*,² and therefore continued in existence.'

Thus, the consequences normally flowing from the dissolution of a company are disregarded in the English liquidation. The company is an existing person, the liquidator may bring actions on its behalf³ and its assets do not pass to the Crown as *bona vacantia*, until the claims of creditors have been satisfied.⁴ The doctrine or pretence of revivification, in fact, means that the dissolution, but the dissolution alone, is to be ignored.⁵ The results caused solely by the dissolution are reversed. Thus, for example, a creditor may prove for a debt which is recoverable and therefore situated in England, but not for one which is situated in Russia and which has for some reason such as illegality or confiscation been extinguished by Russian law.⁶ In such a case the annihilation of the debt is not due solely to the dissolution of the corporate debtor.

Effect of
revivi-
fication

The provision in the Act of 1948, that a company may be wound up notwithstanding its dissolution in the country of its incorporation, necessarily implies the recognition of the other statutory provisions relating to winding-up, including that which directs that the surplus assets of a dissolved company shall be distributed among 'the persons entitled thereto'.⁷ In the case of a foreign company, therefore, it must be ascertained whether the law under which it was incorporated recognizes the existence of any such persons and if this is found to be the case their rights must be satisfied before the Crown can establish its claim to the surplus as *bona vacantia*.⁸

Disposal
of surplus
assets

¹ Ibid., at p. 427.

² Italics supplied.

³ *Russian & English Bank v. Baring Bros. & Co.*, [1936] A.C. 405.

⁴ *In re Azoff-Don Commercial Bank*, [1954] Ch. 315.

⁵ *I. & C.L.Q.* 691.

⁶ *Re Banque des Marchands de Moscou* (No. 2), [1954] 1 W.L.R. 1108; [1954] 2 All E.R. 746.

⁷ Companies Act, 1948, s. 265.

⁸ *In re Banque des Marchands de Moscou (Koupetschesky)*, [1958] Ch. 182.

Recovery
of post-
dissolution
debts

A question upon which two judges have differed¹ is whether debts alleged to have been contracted in the interregnum between the dissolution of the company and the order for winding-up can rank for payment, since the logical difficulty again arises that the non-existent company was at that time incapable of entering into binding transactions. It is respectfully submitted that Wynn-Parry J. has reached the correct solution by carrying the doctrine of revivification to its logical conclusion and holding that the dissolution of the company before the creation of the debt must be ignored.² In an earlier case, however, which was not brought to the notice of the learned judge, Vaisey J. had reached the opposite conclusion.³

Effect
of certain
imperial
statutes

✓ (2) *Effect in England of a foreign adjudication in bankruptcy*

In considering the extent to which a foreign adjudication (or some analogous process) operates in England it is necessary to notice that adjudications in Scotland,⁴ Northern Ireland⁵ and Eire⁶ stand in a somewhat different position from those in other countries. The title of a trustee appointed in any one of these three countries extends not only to the movables of the debtor but also to his immovables, no matter where they may be situated.

Extent
of foreign
trustees'
title

With regard to adjudications in other countries, the question is whether the status of a foreign trustee is so far recognized by English law that he acquires a title to the bankrupt's property in England. Does the assignment of the bankrupt's property which has been made to the trustee by the foreign law under which he has been appointed entitle him to the English property, or is it necessary that there should be an independent adjudication in this country? The laws of England and of the United States of America differ on this matter.

American
rule

✓ The doctrine of *territoriality* prevails generally in America. This is that an assignment under a state insolvency law operates only upon property within that state, so that the title acquired

¹ Vaisey J. in *Re Banque des Marchands de Moscou, Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269; Wynn-Parry J. in *In re Russian Commercial and Industrial Bank*, [1955] Ch. 148.

² *In re Russian Commercial and Industrial Bank*, *supra*.

³ *Re Banque des Marchands de Moscou, Wilenkin v. The Liquidator*, [1952] 1 All E.R. 1269.

⁴ Bankruptcy (Scotland) Act 1913, s. 97.

⁵ Bankruptcy and Insolvency (Ireland) Act, 1857, ss. 267, 268.

⁶ The Act cited in note 5 *supra* still applies to Eire.

by the trustee is of no avail against creditors who attach property under the law of another state where it is actually situated.¹

The English courts, on the other hand, have consistently applied the doctrine of *universality*, according to which they hold that all *movable* property, no matter where it may be situated at the time of the assignment by the foreign law, passes to the trustee.² Thus the trustee can recover movables, including *choses in action*, found in England, and his title is not displaced if a creditor, after commencement of the bankruptcy, attaches property of the bankrupt by process of law in England. This doctrine is of ancient origin. In *Solomons v. Ross*,³ (1764), English law adopts doctrine of universality.

X & Co., Dutch merchants, were declared bankrupt on 2 January and *X* was appointed curator of their property by the Chamber of Desolate Estates in Amsterdam. Previously, on 20 December, *Z*, an English creditor of *X & Co.*, had attached £1,200 in the hands of *A* which was due from *A* to *X & Co.* In March *Z* obtained judgment by default on the attachment, whereupon a writ of execution was issued against *A*. Being unable to pay, *A* gave *Z* a promissory note for the amount of the judgment. In proceedings brought by the curator, *Y*, it was held that *A* must pay the £1,200 to *Y*, and that the execution creditor, *Z*, must surrender the promissory note to *A*.

It was emphasized in the judgment, at least in one report of the case,⁴ that Dutch law, in the event of a Dutch bankruptcy, permitted foreign creditors to share the assets equally with local creditors. It is not certain, therefore, that the English court would follow the decision if the trustee were appointed in a country such as Argentina where there is discrimination against foreign creditors.⁵

The courts, however, have not accepted the suggestion made in the decision that the title of the foreign trustee overrides encumbrances already acquired by third parties over property of the bankrupt situated in England. If, for instance, *X* obtains a garnishee order attaching a debt owed in England by *A* to *B*

¹ *Security Trust Co. v. Dodd Mead & Co.* (Supreme Ct. U.S.A.), 1899; Lorenzen, p. 911. It has been doubted, however, whether this is true since the American Bankruptcy Act, 1898; Nadelmann in 59 *Harvard L.R.* 1027.

² *Solomons v. Ross* (1764), 1 H.Bl. 131 (N); *Jollett v. Deponthieu* (1769), 1 H.Bl. 132 (N); *Alivon v. Furnival* (1834), 1 C.M. & R. 277.

³ 1 H.Bl. 131 (N). For a full account and an evaluation of the case see K. H. Nadelmann in 9 *M.L.R.* 154, who refers to another and a fuller report in Wallis's *Irish Chancery Reports* (1839), p. 54.

⁴ The Irish report mentioned in the last note.

⁵ 9 *M.L.R.* 163 et seqq.

and *B* is *later* declared bankrupt abroad, the attachment ranks prior to the title of the foreign trustee.¹

'In each case the question will be whether the bankrupt could have assigned to the trustee at the date when the trustee's title accrued, the debt or assets in question situated in England.'²

Foreign trustee must be appointed in proceedings to which debtor is a party The question that arises is—What is meant by a 'foreign trustee'? The original rule probably was that, for the doctrine of universality to apply, the trustee must be a person appointed by the *lex domicilii* of the bankrupt. The very principle, indeed, upon which the doctrine was based found its justification in the conception of domicil. The argument was that movable property, having no locality, was subject to the law of the owner's domicil. Since a voluntary assignment valid according to the owner's *lex domicilii* was supposed to be effective everywhere, it was said that an involuntary assignment under the bankruptcy laws of that domicil must of necessity be equally effective.³ The modern cases, however, establish that a foreign trustee need not derive his title from the *lex domicilii* of the bankrupt in order to substantiate his claim to English movables. Perhaps, all that can be said positively is that it is sufficient if the bankrupt was 'properly subject'⁴ to the jurisdiction of the courts of the country in which he has been made bankrupt, though it has been objected with some force that this is to beg the question.⁵ It may be that the possession by the bankrupt of assets in the country of adjudication will entitle the trustee to claim movables in England.⁶ What is certain is that he will be able to do so if the bankrupt has been a party to the foreign proceedings in which the adjudication order was made.⁷ In the case of *In re*

(ii) *Anderson*:⁸

A domiciled Englishman, who was entitled to a reversionary interest in English money, was adjudicated bankrupt in New Zealand in proceedings to which he was a party. By an oversight, the reversionary

¹ *Galbraith v. Grimshaw*, [1910] A.C. 508; *Singer & Co. v. Fry* (1915), 84 L.J. (K.B.) 2025. *Anantapadmanabhaswami v. Official Receiver of Secunderabad*, [1933] A.C. 394.

² *Galbraith v. Grimshaw*, *supra*, at p. 511, *per* Lord Loreburn.

³ Story, s. 404.

⁵ Blom-Cooper, *op. cit.*, p. 91.

⁴ Dicey, p. 703, Rule 144.

⁶ *Ibid.*, p. 92.

⁷ *In re Davidson* (1873), L.R. 15 Eq. 383; *In re Lawson's Trusts*, [1896] 1 Ch. 175; *In re Anderson*, [1911] 1 K.B. 896; *In re Craig* (1916), 86 L.J. (Ch.) 62; *Bergerem v. Marsh* (1921), 151 L.T. 264. For the abandonment of the theory that bankruptcy in the debtor's domicil was essential see *Raeburn* in 26 *B.T.F.I.L.* 189 et seqq.

⁸ [1911] 1 K.B. 896.

interest was not disclosed in the New Zealand proceedings. Six years later the debtor was declared bankrupt in England.

It was held that the New Zealand trustee, despite the fact that he was not appointed in the bankrupt's domicile, was entitled to the reversionary interest as against the English trustee.

'Therefore, I think,' said Phillimore J., 'upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied.'

The principle of universality does not apply to immovables, but the English court may, in the exercise of its discretionary jurisdiction, permit a foreign curator or trustee to sell land situated in England for the benefit of the bankrupt owner's creditors.¹

(3) Effect of an English adjudication

The Bankruptcy Act, 1914,² provides that the property of a bankrupt upon adjudication shall pass to his trustee in bankruptcy, and by a later section³ 'property' is made to include:

'Money, goods, things in action, land, and every description of property whether real or personal and *whether situate in England or elsewhere*. . . .'

With regard to the effect of such an adjudication in Scotland and Ireland, it is provided that any order made by an English Court of Bankruptcy shall be enforced in Scotland and Ireland (including now Éire) in the same manner in all respects as if the order had been made by the Court required to enforce it.⁴

Quite apart from the special cases of Scotland and Ireland, it will be noticed that the Act expressly and deliberately attributes a very extensive effect to an English adjudication. Not only movables, but even immovables, belonging to the debtor, 'whether situate in England or elsewhere', are to pass to the trustee. Despite the intention of the Act, however, it is obvious that a distinction must be drawn between countries forming part of the dominions of the Crown and other foreign countries.

With regard to the former, the judicial view is that the Bankruptcy Act is an imperial statute which operates to vest in

¹ *In re Kooperman*, [1928] W.N. 101.

² S. 53.

³ S. 167.

⁴ S. 121; S.R. & O. 1923, No. 405.

English
immov-
ables

Effect in
Scotland
and
Ireland

Effect
in other
countries

British
foreign
countries

the trustee all property that the debtor may own in any of the dominions of the Crown.¹ Notwithstanding the criticism of Westlake,² this view would appear to represent the effect in law of the statute, for in theory, at any rate, it is undoubted that Parliament may pass an Act to bind all parts of the Empire, subject, however, to the power of repeal given by the Statute of Westminster, 1931, to Dominion Parliaments.

Non-British
foreign
countries

The question, however, is for the most part of academic interest as regards non-British foreign countries. Whatever may have been the intention of the Legislature in passing the Bankruptcy Act, it is clear that an English adjudication cannot of its own force have any effect upon property situated in, say, France or Germany. The effect can be only that which is permitted by the local law. It is true that if the debtor is present in England he may be compelled to render his foreign property available for the creditors, since the Act expressly provides that:

‘He shall execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property . . . as may be reasonably required by the . . . trustee.’³

Is creditor who recovers debt abroad liable to account to English trustee?

Nevertheless there is one type of case in which the operation upon foreign property of an adjudication becomes of great practical importance, and in which the theory that the Bankruptcy Act embraces property wherever situate demands consideration. This is where a creditor recovers payment abroad from a debtor who has previously been made bankrupt in England. Can the English court make such a creditor disgorge what he has obtained? It is clear that the court is powerless if the creditor remains abroad, but what if he should be found in England?

The hotch-pot rule

In this connexion one rule is clearly established, namely, that a creditor, whether an alien or a British subject, will not be allowed to prove in the English bankruptcy for any further debts unless he brings into hotchpot what he has already recovered abroad.⁴ This was made clear by Lord Cairns in Banco de Portugal (v.) Waddell:⁵

‘A person who, after having proved under a foreign bankruptcy,

¹ *Callender, Sykes & Co. v. Colonial Secretary of Lagos*, [1891] A.C. 460, 467; a decision upon the Act of 1869.

² S. 137.

⁴ *Ex parte Wilson* (1872), L.R. 7 Ch. 490; *Banco de Portugal v. Waddell* (1880), L.R. 5 App. Cas. 161.

⁵ (1880), L.R. 5 App. Cas. at p. 167.

³ S. 22 (2).

claims to prove in a bankruptcy of the same debtors in England, may do so; but he must do so upon the terms of bringing in, for the purpose of dividend, the sum which he has received abroad. As was said by Lord Eldon,¹ "It has been decided that a person cannot come in under an English commission without bringing into the common fund what he has received abroad"; and Lord Eldon goes on to point out, what is obviously the case, that a creditor, because he happened personally to be in England, would not be obliged to bring this sum into the common fund—he might keep it if he liked—he might ignore the English bankruptcy proceeding altogether if he pleased; but if he did not ignore it, if he sought to take advantage of it . . . , then, on the principle that he who asks for equity must do equity, he must bring into the common fund that which he had already received in respect of the obligations of the same debtors.'

So far the law is clear. The difficult question remains, however, whether a creditor who has obtained payment abroad, whether by action or not, and who does not seek to participate in the English bankruptcy, can be made to disgorge what he has recovered, on the ground that he has diminished the fund available for the general body of creditors. In the passage cited above Lord Cairns, ostensibly quoting Lord Eldon, intimated that no such action would lie against the creditor, but it is doubtful whether he correctly interpreted the view of Lord Eldon. That learned judge admitted that the creditor could not be compelled to *prove* in the English bankruptcy, but he went on to observe that whether the trustee could 'by law in another form' get the property out of the creditor's hands was a different question.

Position
of creditor
who takes
no part in
English
proceedings

There are three cases, all decided between 1791 and 1795, *Sill v. Worswick*² in which the issue was raised. These are *Sill v. Worswick*,² *Hunter v. Potts*;³ and *Phillips v. Hunter*.⁴

✓ In *Sill v. Worswick*, *X*, a domiciled Englishman, was adjudicated bankrupt at Lancaster, Sill being appointed trustee. Worswick, another domiciled Englishman, after and with full knowledge of the bankruptcy, made an affidavit before the Mayor of Lancaster of *X*'s indebtedness to him, and on the strength of this brought an action in the British West Indies against a person who held certain moneys of *X*, and recovered in full the debt which was due to him from *X*.

It was held that the trustee could recover the amount in an action for money had and received.

¹ *Selkirk v. Davis* (1814), 2 Dow. 230, 249.

² (1791), 1 H.Bl. 665.

³ (1791), 4 T.R. 182.

⁴ (1795), 2 H.Bl. 402.

Basis of the
decision
was the
English
residence
of the
creditor

The greater part of Lord Loughborough's judgment is occupied with showing that, since movable property is subject to the *lex domicilii* of the owner, an adjudication made in the country of that domicil embraces property in any part of the world. This principle does not carry us far; for the problem is to discover the circumstances in which a creditor who has acted in disregard of it can be compelled to disgorge. Upon this, which is the sole issue of the case, the learned judge lays down a proposition which, he says, is too clear to require any discussion, namely, that a creditor, resident in England and therefore subject to the jurisdiction of the English court, cannot avail himself of a process which he has commenced in England so as to retain his debt against the trustee.

The facts which make it difficult to extract a general principle from this decision are that the diligent creditor started his proceedings for recovery in England, and also that the place of final recovery was within the dominions of the Crown. The crucial factor was the English residence of the creditor. Had he been resident in the West Indies, Lord Loughborough clearly intimated that the trustee would have had no right of action.

'I do not wish to have it understood that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using) that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt.'

(ii) ✓ This seems to have been decided in *Waring v. Knight*.¹
In *Hunter v. Potts*,²

Hunter v.
Potts also
based upon
residence

the creditor and the bankrupt were both resident in England. After the bankruptcy and with knowledge of it, the creditor instructed his attorney in America to attach the effects of the bankrupt in Rhode Island. The attorney attached in the regular way certain money in the hands of X which was due to the bankrupt, and later obtained in the Court of Common Pleas at Rhode Island judgment against the bankrupt for £496. 12s. 9d., which sum he remitted to the creditor in England.

The King's Bench held that the trustee was entitled to recover this sum in an action for money had and received.

Lord Kenyon, in delivering the judgment of the court, is at pains to demonstrate why the English adjudication must pass

¹ See 2 H.Bl. 413.

² (1791), 4 T.R. 182.

the property in Rhode Island to the trustee, but the true ground of the decision is indicated in the following sentence:

‘For it must be remembered that during the progress of this business all these parties resided in England; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt’s property there, in violation of the rights of the rest of the creditors, which were then vested; but such an attempt cannot be sanctioned in a court of law.’

The head-note to the report of *Phillips v. Hunter*¹ is as follows: *Phillips v. Hunter*

- (iii) ✓ ‘*A, B, and C* being partners in trade in England, *A* and *B* reside in England and *C* goes to a foreign country for the purpose of managing the concerns of the house in that country. *D* is also resident in England, where a debt is contracted by *D* to *A, B, and C*. Later, *D* becomes insolvent, and *C*, knowing that *D* has stopped payment, and after a commission of bankruptcy has in fact issued against *D*, attaches in the names of himself and his partners a debt due to *D* in the foreign country by legal process, and obtains payment of it under judgment of a Court of justice of that country.’ All parties subject to English law

On these facts the Exchequer Chamber held by six judgments to one, there being a trenchant dissenting judgment by Eyre C.J., that the English trustee was entitled to recover the money in an action against *A, B, and C* for money had and received. The gist of the judgments of the majority is deducible from the following sentences:²

‘It must be remembered that . . . the bankrupts were English traders, that the defendants were partners in an English house, that the debt from the bankrupts to the defendants was contracted in England, that the bankrupts as well as the defendants were resident in England, and that *C*, who must also be taken to be an English subject, went from this kingdom to America, for the special and temporary purpose of transacting business for the English house in which he continued to be a partner. All these facts appearing . . . this case must be argued as arising between English subjects upon English property. . . . When the debt, therefore, was contracted, all the parties were as much subject to the bankrupt laws as to the other laws of England under which they lived.’

In a later part of the judgment it is said that if a debtor’s foreign property could be obtained by a creditor’s *going from hence for that purpose*, the result would be damaging to the credit of the debtor in England.

¹ (1795), 2 H.Bl. 402.

² *Ibid.*, at pp. 404–5.

True
test would
seem to be
whether
creditor is
subject to
English
bankruptcy
jurisdiction

It is submitted that the true principle deducible from the authorities is a very simple one, namely: Is the creditor subject to the English bankruptcy law or is he not? If he is subject to the jurisdiction of the English Court of Bankruptcy, he is liable to refund what he has recovered abroad; if not subject to the jurisdiction he is immune from liability, unless, of course, he seeks to prove in the bankruptcy.¹ But though the principle submitted is a simple one, its defect perhaps is the difficulty of defining with precision what is meant by subjection to the English bankruptcy jurisdiction. According to the doctrine of effectiveness, jurisdiction can in general be exercised against any person upon whom, owing to his presence in England, a writ of summons can be served. It may be asked, therefore, whether a creditor, who has obtained payment in full abroad of a debt due to him from an English bankrupt and who is at the moment in England, can be sued for refundment by the trustee on the ground that his presence here renders him amenable to the jurisdiction. This argument is untenable. It is bankruptcy jurisdiction, not jurisdiction in general, that has to be considered. It is the time of receipt of payment, not the time of the action for refundment, that is material. If bankruptcy jurisdiction cannot be exercised against a *debtor*, despite his presence in England, unless one of the conditions specified in section 4 (1) (*d*) of the Act² is true of him, it would seem to follow that the jurisdiction cannot be exercised against a *creditor* unless the same conditions are applicable to him at the time when he receives the payment. Logically, it is difficult to believe that the court possesses a wider jurisdiction over a creditor than over a debtor against whom an adjudication order is sought.³

4. *Administration in bankruptcy*

Lex fori
governs

We have already noticed that a foreigner is entitled to prove in an English bankruptcy even though the debt which he claims was contracted abroad. He is, however, in exactly the same position as English creditors with regard to all matters that concern the administration of the estate. The duty of the trustee is to distribute the estate among all creditors, whether English or foreign, but all questions arising in connexion with

¹ For the position in the Americas see Nadelmann, 96 *Pennsylvania Law Review*, 171 et seqq.

² *Supra*, p. 512.

³ Blom-Cooper, op. cit., pp. 130 et seqq. For a general discussion of the question, see Dicey, pp. 693-6.

the distribution fall to be decided by English law as being the *lex fori*. The law which distributes the assets must necessarily regulate the manner and course of distribution.

Thus, whether a debt is admissible of proof,¹ whether a creditor of a partnership can prove against the separate estate of an individual partner,² whether a foreign creditor who proves in the bankruptcy can be compelled to restore property which he has improperly obtained from the debtor,³ and questions of priority of payment,⁴ are all matters that must be governed by the *lex fori*.⁵ Examples

5. Discharge

Since the effect of a discharge in bankruptcy is to free the debtor from liabilities incurred prior to the order of discharge, it is important to know whether a discharge in one country is an effective plea in another. Where must the order of discharge be made in order to have universal effect? The answer that English law makes to this question depends upon whether or not the order is made under the provisions of an imperial statute.

If the bankruptcy occurs in England,⁶ Ireland⁷ or Scotland,⁸ any order of discharge that is made prevails throughout the dominions of the Crown, no matter what may be the proper law of the transaction under which the cause of action arose.⁹ Effect of discharge in British dominions

'Where the discharge,' said Bovill C.J., 'is created by the legislature or laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property wherever it may be situate, subject to the special laws of any particular country which may be able to assert a jurisdiction over it.'¹⁰

¹ *Ex parte Melbourn* (1870), L.R. 6 Ch. 64.

² *Brickwood v. Miller* (1817), 3 Mer. 279; cp. *In re Doetsch*, [1896] 2 Ch. 836.

³ *Ex parte Robertson* (1875), L.R. 20 Eq. 733.

⁴ *Thurburn v. Steward* (1871), L.R. 3 P.C. 478.

⁵ As to the difficulty of distinguishing between administration, i.e. procedure, and substance see Blom-Cooper, op. cit., pp. 141 et seqq.

⁶ Bankruptcy Act, 1914.

⁷ Bankruptcy and Insolvency (Ireland) Act, 1857.

⁸ Bankruptcy (Scotland) Act, 1913.

⁹ Dicey, p. 697.

¹⁰ *Ellis v. M'Henry* (1871), L.R. 6 C.P. 228, 234-5; and see the authorities there cited.

Effect of
discharge
made in
foreign
countries

Where, however, no imperial statute is applicable, as, for example, where a debtor is discharged in France, everything depends upon the law that governs the obligation.¹ If the order of discharge is made under the proper law of the debt or other liability in question, it is effective in England;² if made under any other law, it is ineffective in England.³ A discharge by the proper law is a discharge everywhere. Thus in *Gardiner v. Houghton*:⁴

Discharge
effective if
made under
the 'proper
law' of the
obligation

It was pleaded to an action for money had and received that the debt was contracted in Victoria while the defendant was resident there, and that he was subsequently discharged from the debt under the insolvency laws of that colony. The replication to the plea was that when the debt was contracted the *plaintiff* was resident at Liverpool; and that defendant was now resident in England, and that the debt ought to have been paid in England.

It was held that the replication showed no answer, for it admitted that the contract was made in Victoria and it did not aver that the debt was payable only in England. In other words, it did not disprove that Victorian law was the proper law of the debt.

Discharge
ineffective
if not made
under the
'proper law'

That a discharge under some law other than the proper law is devoid of extra-territorial effect is well illustrated by *Gibbs & Son v. Société Industrielle*.⁵

In that case the defendants, a French company, made a contract through their London broker for the purchase of copper from the plaintiffs, London merchants. The contract, besides being made in London, was expressed to be subject to the rules of the London Metal Exchange; delivery was to be at Liverpool; and payment was to be made in cash in London. It was therefore an English contract. In an action brought for non-acceptance of the copper, the defendants pleaded that by a judgment of a French court they had been pronounced to be in judicial liquidation. Assuming that by French law this pronouncement discharged the defendants from all liability under the contract, the question was whether it had the same effect in England so as to bar the plaintiffs' right to sue here.

The argument for the defendants was based on the French domicile of the company. It was said that when a debtor is domiciled in a foreign country and made bankrupt there, then

¹ Westlake, s. 240.

² *Ellis v. M'Henry*, *supra*, at p. 234 and authorities there cited.

³ *Gibbs v. Société Industrielle* (1890), 25 Q.B.D. 399; *Smith v. Buchanan* (1800), 1 East 6.

⁴ (1862), 2 B. & S. 743.

⁵ (1890), 25 Q.B.D. 399.

any rule of the foreign bankruptcy law which prevents actions from being maintained against the debtor is recognized in England. This argument did not prevail and judgment was entered for the plaintiffs. Lord Esher, after pointing out that a contract is governed by its proper law, dealt as follows with the contention that the *lex domicilii* ought to be regarded:¹

'The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said in *Smith v. Buchanan*,² it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied.'

II. ASSIGNMENT ON MARRIAGE

The problem that confronts us here is to ascertain what system of law regulates the rights of a husband and wife in the movable property which either of them may possess at the time of marriage or may acquire afterwards. Important consequences may ensue according as this or that law is chosen. For instance, the result of choosing one particular legal system may be that the property of the wife passes entirely to the husband, as was substantially the case in England prior to 1883. Again, if an Englishwoman marries a Dutchman and Dutch law is regarded as the governing system, it may be that the parties became subject to *communauté des biens* under which everything that belongs to either spouse at the time of marriage or that is acquired by either afterwards is owned by them jointly. They become co-owners of everything by the mere fact of marriage.³

Problem
to be
discussed

The primary rule is that the effect of marriage upon the proprietary rights of the parties in movables is determined by the law of the husband's domicile.⁴ In the words of Lindley L.J.: Law of husband's domicile governs

'It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage upon the movable property of spouses

¹ 25 Q.B.D. at p. 406.

² (1800), 1 East 6.

³ For a valuable summary of the different systems found in the world see Wolff, pp. 355-8.

⁴ *Sawer v. Shute* (1792), 1 Anstr. 63; Foote, p. 348; Story, s. 186; Dicey, Rule 185; Westlake, s. 36.

depends (in the absence of any contract) on the domicile of the husband in the English sense.¹

This statement, clear though it appears on the surface, raises two problems that, owing to the scarcity of authority, are by no means easy to solve.

First, what is meant by 'the law of the husband's domicile'? Secondly, what is the effect if the law of the husband's domicile is subsequently changed?

What is the
'husband's
domicil'?

The prevalent view for many years was that the determining domicile is that which the husband possesses *at the time of the marriage*.² On the whole it is an unobjectionable view, for in the vast majority of cases the parties retain the husband's domicile immediately after the marriage. Nevertheless, a rule better calculated to function more justly and more conveniently in every case is one which selects the country of the intended matrimonial home. This is equivalent in the normal case to the domicile at the time of marriage, but its merit is that it meets the not unusual case where the parties intend to settle immediately after marriage in another country and in fact do so. The significant difference between these two views cannot be better illustrated than by the facts of the South African case, *Frankel v. Commissioners of Inland Revenue*.³

H, whose domicile of origin was German, and *W*, domiciled in Czechoslovakia, were married in Czechoslovakia in 1933. At the time of the marriage the parties had definitely agreed that they would leave Europe for good and settle permanently in the Transvaal at Johannesburg. They established their home in that city four months after the marriage. After working there for four years, *H* was appointed by his firm director of their branch in Natal, whereupon he and *W* established their home in Durban with the intention of remaining there permanently. Eleven years later, *H* died. According to the law of South Africa, the parties had married in community of property, but according to German law the doctrine of community was inapplicable. If South African law applied, as *W* claimed, death duties were not payable. The Appellate Division of the Supreme Court of South Africa held unanimously that German law applied.

Domicil
intended
by the
parties
prevails

It is questionable whether this decision is compatible with

¹ *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 233. For an example of the application of this rule see *In re Bettinson's Question*, [1956] Ch. 67.

² Dicey, p. 795, Rule 171; Westlake, s. 36; Foote, p. 348; Beale, p. 1013; *Welch v. Tennent*, [1891] A.C. 639, at p. 644, *per* Lord Herschell.

³ [1950] 1 S.A.L.R. 220. For a full statement and discussion of the case see 3 *J.L.Q.* 439-42 (Ellison Kahn).

the general principle adopted by English private international law. The principle is that the identity of the governing law must depend upon the intention of the parties. If they have expressed their intention in an ante-nuptial contract, such as a marriage settlement, *cadit quaestio*. The contract governs their proprietary rights not only in the chosen country, but also in any other country where they may later establish their matrimonial home.¹

'It is universally admitted', said Lord Brampton, 'that where, upon marriage, a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled.'²

Thus in *Anstruther v. Adair*³ it was held that a domiciled Scotsman, who was entitled under a Scottish marriage settlement to any property that his wife might obtain during coverture, had an absolute claim to a sum of money falling due to the wife in England, even though by English law he would have been liable in equity to execute a settlement of the money.

The implicit intention of the parties is equally effective if, though not expressed, it may be inferred by the court from the circumstances. In other words, the court gives effect to a tacit as well as to an express contract. An agreement by parties to establish the family home in a country other than the husband's present domicile may well connote an implicit agreement that their mutual proprietary rights should be adjusted according to the law of the new country.⁴ Thus, in *De Nicols v. Curlier*⁵ the House of Lords recognized the validity of an implicit contractual obligation as no less binding than that of an express contract. It is no doubt true that a domicile cannot be acquired by intention alone, but as Nelson remarked over seventy years ago, to press this rule 'so far in application as to hold that proprietary rights of this description must be determined by a law

Implicit
intention
sufficient
in prin-
ciple

¹ *Anstruther v. Adair* (1834), 2 My. & K. 513; *Este v. Smyth* (1854), 18 Beav. 112; *Duncan v. Cannan* (1854), 18 Beav. 128, 142; *In re Fitzgerald*, [1904] 1 Ch. 573; *Montgomery v. Zarifi* (1919), L.J.P.C. 20; *De Nicols v. Curlier*, [1900] A.C. 21.

² *De Nicols v. Curlier*, *supra*, at p. 46.

³ (1834), 2 My. & K. 513; and see *In re Fitzgerald*, [1904] 1 Ch. 573, 596.

⁴ Story, para. 199.

⁵ [1898] 1 Ch. 403; reversed, [1898] 2 Ch. 60; reversal reversed, [1900] A.C. 21. The facts of the case are given at pp. 48-49, *supra*; and see also p. 604, *infra*. It should be noticed that the House of Lords used the implicit obligation in the case before them to apply the law of the ante-nuptial domicile of the parties.

which both parties intend straightway to abandon, must, it would seem, in many cases work great hardship'.¹

Implicit
intention
now held
to be
sufficient

The possibility of inferring such a contract has now been confirmed by Roxburgh J. in *In re Egerton's Will Trusts*.² He there admits that an agreement to change the domicile, followed by an actual change, may render the law of the new domicile applicable, provided that a common intention to embrace this new law may be inferred. The importance of his judgment lies in the fact that, for the first time in England, the court has declared itself ready to oust the *lex domicilii* to which the husband was subject at the time of the marriage if an intention to adopt the law of another domicile can be spelt out of the facts of a particular case.

'In my judgment', he said, 'it is reasonably plain that there is a presumption that the law of the husband's domicile applies to a marriage, and that the presumption can be rebutted. It can certainly be rebutted by express contract and, in my judgment, it could also be rebutted by what is loosely called a tacit contract, if the circumstances warrant the inference of such a tacit contract.'³

But everything, he emphasized, must turn upon the precise facts of each case, including the reliability of the evidence by which the alleged agreement to change the domicile is supported and the length of time that may have elapsed before the fulfilment of that agreement. If there were such an agreement and if it were immediately put into effect, it would be comparatively easy to draw the inference that the parties intended the law of the new domicile to apply. But even in these favourable circumstances the inference would not necessarily be drawn.

'Take, for example,' he said, 'the case of two comparatively poor persons, one, the woman, having a few National Savings Certificates, and the man being a weekly wage earner. They both decide to emigrate to Australia. I can well believe that the court might think that that was enough in those circumstances to lead to the inference that they intended their proprietary rights (which at that stage were nugatory but which might thereafter become of great value) to be regulated from the beginning of their married life by the law of Australia. . . . However, take the case of an elderly widower who was a director of half a dozen companies in England and held shares and debentures and exchequer bonds and various things in England. He marries a young wife and, being ill and in need of a warm climate, agrees to leave immediately to take up his

¹ *Private International Law*, p. 107.

² [1956] Ch. 593; [1956] 2 All E.R. 817; 33 *B.T.B.I.L.* 345-7 (P. B. Carter).

³ [1956] Ch. 593, at p. 607.

home in South Africa. I cannot imagine that any court would ever draw the inference from the mere fact that they had decided immediately to leave for South Africa to make it their permanent home, and did so, that he intended that all his proprietary rights should, as from the date of their marriage, be governed by the law of South Africa.¹

In view of the judgment in this case, the submission, that an agreement to settle in a new country after the marriage imports a common intention to subject the proprietary rights of the parties to the law of that country, is no longer tenable. Such an intention cannot be inferred unless warranted by the circumstances associated with the agreement. In *Egerton's Case* itself the particular circumstances did not warrant the inference. The facts were these:

On May 6th, 1932, the testator domiciled in England married a woman domiciled in France. He acquired a French domicil at some time after September, 1934, and retained it until his death. The question to be decided was whether his estate should be administered on the footing that he and his wife were subject to the French régime of community of property at the time of the marriage.

In support of the contention that the law of France applied, since the parties had agreed before marriage to settle in that country, the wife swore the following affidavit, which was accepted by the court:

'Neither before nor at the time of my marriage to the testator, nor at any time afterwards, was there any discussion or express agreement between us as to community or separation of property. It was, however, agreed between us before marriage that as soon as possible we would settle in France and establish our permanent and only home there. We carried this intention into effect, and neither of us ever had a permanent home outside France after the date of our marriage.'

Roxburgh J. held that the agreement to change the domicil did not render the proprietary rights of the parties subject to French law. The equivocal nature of the agreement which contemplated no immediate change of home, but only one that should be effected 'as soon as possible'; the long period that in fact elapsed before the new domicil was acquired; the lack of any evidence that the parties even appreciated the difference between the property régimes of the two countries, precluded the inference that in the minds of the parties the law of England was to be supplanted by that of France. On the other hand, it

¹ [1956] Ch. at p. 605.

is submitted that in *Frankel's Case* the only reasonable intention to attribute to the parties was to sever all links with the German domicil of origin of the husband as quickly as possible.

Stated in general terms, the present rule would seem to be this:

The presumption is that the rights of married persons in each other's movables are governed by the *lex domicilii* of the husband at the time of the marriage. This presumption may be rebutted by an express or implied agreement, made before marriage, that their rights shall be governed by the law of some other country in which they have already decided to establish their matrimonial home. Whether such an implied agreement is established depends upon the surrounding circumstances as a whole.

What is the effect of a change of domicil?

The decisive factor then in fixing the law to govern the rights of the parties in each other's movables is the domicil of the marriage, which, as we have seen, may be the domicil of the husband at the time of the marriage or that which the parties have expressly or implicitly agreed to acquire. But now a second question arises—What is the effect of a subsequent change of the marriage domicil? Are the mutual proprietary rights of the spouses affected by the change?

The doctrine of immutability

Most legal systems adopt what has been called the doctrine of immutability,¹ according to which the rights of property in movables as fixed by the law of the marriage domicil are unaffected by the acquisition of a fresh domicil. Thus the established rule in South Africa is that the law of the matrimonial domicil governs the rights of the spouses in movables, whether existing at the time of marriage or acquired later, and continues to govern them despite change of domicil. This is so even with respect to movables acquired in the new domicil.² The prevailing rule in the United States of America is not so comprehensive. The law of the marriage domicil continues to govern movables owned at the time of marriage, but movables acquired later are subject to the *lex domicilii* of the parties at the time of acquisition.³

Controversy as to whether the doctrine prevails in England

It is generally said that, according to English private international law, if the marriage domicil is abandoned the proprietary rights of the spouses are governed by the law of the new domicil. It is extremely doubtful, however, whether Eng-

¹ Wolff, op. cit., pp. 360-1.

² *Gaarn v. Cairn's Executors*, [1910] E.D.L. 462.

³ Goodrich, ss. 119, 120.

lish law is committed to this doctrine of mutability. The one case invariably cited in its support is *Lashley v. Hog*,¹ but when analysed this appears to be quite irrelevant to the controversy. The facts were these:

Hog, a native of Scotland, married an Englishwoman at a time when he was domiciled in England. There was no marriage settlement. After living fifteen years in England the parties acquired a domicile in Scotland. Hog survived his wife and died in 1789. After his death, his daughter, Mrs. Lashley, brought an action in the Scottish court claiming as the representative of her mother a share in her father's movables which, according to the then law of Scotland, were subject to the doctrine of *communio bonorum*. The basis of her claim was that, upon the change of domicile from England to Scotland, her father's proprietary rights *vis-à-vis* his wife became restricted by the Scottish rule of community.

The House of Lords held that Scottish law governed Mrs. Lashley's claim, and that she was entitled in right of her mother to a share of the movables owned by her father at the time of her mother's death.²

What was the *ratio decidendi*? Was it that the rights of the wife with regard to the matrimonial property were enlarged as a result of the change of domicile? It would seem not. The view of the House of Lords was that the matter 'turned on testamentary and not on matrimonial law'.³ The so-called *communio bonorum* did not give the wife on marriage a proprietary interest similar to that recognized, for instance, by Dutch law, but only a *spes successionis*.⁴ The question, therefore, was not: Were the rights of the wife enlarged by the change of domicile? but, What were the succession rights of the wife or her representative on the death of her husband? Thus Lord Halsbury, speaking of the decision in a later case, said:

'If the wife by the marriage in Scotland⁵ acquired no proprietary rights whatever, but only what is called a hope of a certain distribution upon the husband's death, it is intelligible that that right of distribution, or by whatever name it is called, should be dependent upon the husband's domicile, as following the ordinary rule that the law of a person's domicile regulates the succession of his movable property. But if by the marriage the wife acquires as part of that contract relation a real

¹ (1804), 2 Coop. t. Cott. 449; 47 E.R. 1243, 4 Paton 581.

² See now the Married Women's Property (Scotland) Act, 1920, s. 7.

³ Westlake, p. 74.

⁴ 53 L.Q.R. 539-40. For the purposes of private international law, it is treated in Scotland as a right of succession; 19 M.L.R. 664 (A. E. Anton), citing *Trevelyan v. Trevelyan* (1873), 11 M. 516.

⁵ The marriage in fact took place in London.

proprietary right, it would be quite unintelligible that the husband's act¹ should dispose of what is not his; and herein, I think, is to be found the key to Lord Eldon's judgment.²

The last sentence of this statement is a repudiation of the doctrine of mutability, for if the wife's acquired rights cannot be defeated by a change of domicile, neither can they be enlarged.

A decision in favour of immutability A more decisive authority than *Lashley v. Hog* must be found, then, before it can be categorically asserted that the proprietary relations between husband and wife change with a change of their domicile. It is a strong assertion to make, for, as Westlake says, 'justice is shocked by allowing the husband to affect the wife's position by a change for which he does not require her assent'.³ What is shocking is suspect, and it is in fact extremely doubtful whether English law has adopted the doctrine of mutability to its full extent. This doubt is engendered by *Chiwell v. Carlyon*,⁴ a case which appeared before both the English and the South African courts and which merits some consideration.

In 1887 *H* married *W* at Kimberley in South Africa. No antenuptial contract was made. The parties were domiciled at the time in South Africa, and while still so domiciled they made a joint will disposing of their joint estate, i.e. of the movables and immovables that they held in community. In 1892, after the parties had settled in England, certain land in Cornwall was bought by *H* and conveyed to him. *W* died in 1893, *H* in 1895.

The question that arose before the Chancery Division was whether the Cornish land passed under the will of the joint estate. This question would have been summarily dismissed with a negative answer had the true rule been that the proprietary rights of spouses change with a change of domicile, unless, of course, there was a clear intention on the face of the will that the joint property was to include the property later acquired, no matter where acquired. The community property disposed of by the will would not include either movables or immovables acquired by the husband after he had become domiciled in England. Stirling J., however, felt that the *lex domicilii* of the parties at the time of their marriage could not be disregarded, for he submitted two questions to the Supreme

¹ i.e. the act of changing his domicile.

² *De Nicols v. Curlier*, [1900] A.C. 21, at p. 27.

³ *Private International Law*, (7th edn.) p. 73.

⁴ (1897), 14 S.C. 61 (South Africa).

Court in the Cape of Good Hope. The second question was this:

Assuming *H* and *W* to have been domiciled in South Africa at the time of their marriage, but subsequently to have acquired an English domicil before the purchase of the land, would this change have any effect by South African law upon their respective rights in regard to the land?

The Supreme Court held that this question must be answered in the negative. The marriage created a universal partnership between husband and wife in all property, movable and immovable, belonging to either of them before marriage or coming to either during marriage. This partnership community extended to foreign land. It was unaffected by a change of domicil. If the rule were otherwise, a husband married in South Africa 'in community of property, who wishes to deprive his wife of her share, might change their domicil to a foreign country where community does not exist and there with impunity obtain the wife's share for himself by investing the whole of the partnership in immovable property situated in such foreign country'.¹

On receipt of this opinion from the South African court, Stirling J. decided that 'in any event the joint estate passing under the said will includes all property which according to the law of the Cape of Good Hope would fall within the community of property which would have been created by the marriage of the testator and testatrix, if they were domiciled at the Cape of Good Hope at the time of their marriage'.² He thereupon made an order declaring that the Cornish land passed under the will. Although dicta may be found to the contrary, it would seem to be clear that the doctrine of community as recognized in South Africa does not rest upon the existence of a tacit contract between the parties. This decision of Stirling J., therefore, must be distinguished from that later given by the House of Lords in *De Nicols v. Curlier*,³ where the facts, though in general similar, related to the French doctrine of community.

Facts corresponding broadly to those in *Chiwel v. Carlyon* *Callwood v. Callwood* v. *Callwood* recurred in the modern case of *Callwood v. Callwood*,⁴ but

¹ *Per* De Villiers C.J., at pp. 67-68.

² This case is not reported in England, but the Public Record Office reference to the Entry Books of Decrees and Orders [Supreme Court of Judicature] is 1897 A. 2919.

³ [1900] A.C. 21, *supra*, pp. 448-9.

⁴ [1960] A.C. 659.

unfortunately the contention that the joint will of the spouses included foreign immovables failed *in limine*, since it was not sufficiently proved that the law of the country where the spouses were domiciled at the time of their marriage attributed extra-territorial effect to the local doctrine of community. This being so, the Privy Council resolutely refused to consider whether the contention was correct in principle.

Inchoate and vested rights distinguished The law, then, is far from certain, but nevertheless an attempt must be made to state the modern rule. The clue to it seems to be the distinction between inchoate and vested rights. Even if the doctrine of mutability is part of English law it can scarcely operate without restriction, for not only justice but principle demands that a spouse shall not by reason of a change of domicile be divested of a right of property actually acquired under the law of the marriage domicile, even though enjoyment of the right may be postponed until the death of the other spouse.¹ Under the Dutch system of community of all goods, for instance, all movables belonging to husband and wife fall on marriage into the common ownership of both. Thus, on marriage, the wife becomes co-owner of movables then belonging to the husband. She also becomes co-owner of future movables when and as they are acquired.² If parties domiciled in Holland at the time of marriage acquire a fresh domicile in England where the husband dies, the wife cannot on principle be deprived by her husband's will of what she owned when she reached England. No doubt the will of her husband, since he dies domiciled in England, is governed by English law, and English internal law does not recognize community of goods, but that cannot entitle him to dispose of what is not his. His power of testamentary disposition is limited by the extent of his title. If he dies intestate, his distributable assets are diminished by the rights of property therein owned by his wife. To recall Lord Halsbury's words: 'If by the marriage the wife acquires as part of the contract relation a real proprietary right, it would be quite unintelligible that the husband's act should dispose of what is not his.'³

But vested rights must be distinguished from those that are inchoate. When the Dutch couple change their domicile from Holland to England, it cannot be said that either of them has a vested right of property in movables not yet acquired.

¹ Wharton (3rd ed.), ss. 1934, 197; Dicey, pp. 657-61; Wolff, pp. 361-3.

² Wolff, *op. cit.*, pp. 356-7.

³ *Supra*, pp. 537-8.

At the most they have a *spes acquisitionis*. It is a *spes* that is not recognized by the law to which they are now subject and which alone can make its voice effective. If, therefore, it should ultimately be decided that the proprietary rights of spouses change with a change in their domicile, this would presumably be subject to the exception that rights vested in either party under the law of some previous domicile remain unaffected.

It remains to consider what law governs the three questions of capacity, formal validity and essential validity in the case of marriage contracts or settlements.

Capacity
to make
marriage
settlement

Capacity.¹ The combination of circumstances which most neatly raises the question of capacity occurs where a woman, being an infant according to the law of her English domicile, makes a nuptial contract in England prior to her marriage with a foreigner, by the law of whose domicile the woman is not subject to any incapacity. A variation, which occurred in *Viditz v. O'Hagan*,² arises if the contract is made in a country which is the domicile neither of the woman nor of the man.

If in these cases we reason by analogy to mercantile contracts, the proper law of the contract governs, but if by analogy to the contract to marry, then the law of the matrimonial home is the governing system.

It is submitted, however, that on principle the proper law of the settlement should govern, and that the proper law is *prima facie* deemed to be the law of the matrimonial home. It is that law which is universally recognized as controlling the personal and proprietary relations of the parties during their marriage, and it is difficult to appreciate why the one question of capacity to make a settlement should be withdrawn from that law and referred to the pre-existing *lex domicilii* of the woman. Though not uttered with reference to infancy, the following words of Sir John Romilly appear to express the true and sensible principle:

On principle law of matrimonial domicile should govern capacity

'I know of no law whatever which would make a marriage settlement, executed and entered into in Paris, by persons who intended to come to this country and to be married here, invalid, by reason of its being a contract that was of no force in France, when the sole object and intention of the settlement was that it should be operative in England, over English property and regulate an English marriage.'³

¹ On this difficult subject see Dicey, pp. 650-2; 54 *L.Q.R.* 78; Morris, op. cit., pp. 417-19.

² *Infra*, p. 542.

³ *Este v. Smyth* (1854), 18 Beav. 112, at p. 122.

English
decisions,
however,
favour *lex*
domicilii of
each party

Yet it is sometimes said that capacity in this connexion must be determined by the *lex domicilii* of each party. If the woman is subject to an incapacity by the law of her pre-nuptial domicil, though not by the law of her intended husband's domicil, the contract is void.¹ At the same time it is reasonably clear that the judgments which lay down this rule are based on hasty generalizations drawn from obscure dicta and partly from the writings of Continental jurists.

The cases in chronological order are: *In re Cooke's Trusts*;² *Cooper v. Cooper*;³ and *Viditz v. O'Hagan*.⁴

In re
Cooke's
Trusts

(1) ✓

The facts of *In re Cooke's Trusts* were that a domiciled English-woman, under twenty-one, married a Frenchman in France. Prior to the marriage, she made a notarial contract in France, which excluded the French doctrine of *communauté des biens* and gave her 'the entire administration of her property and the free enjoyment of her income'. There were three children of the marriage. After having lived in Jersey for eight years separately from her husband, she went through a ceremony of marriage with *X* in 1853 under the mistaken belief that her husband was dead. She resided with *X* and with her three children in New South Wales until her death in 1879. Her French husband did not die until 1877. She made a will leaving all her property to *X*. It was argued that the notarial contract was valid, and that it precluded the testatrix from depriving her children of the vested interests in her property given to them by French law.

Stirling J., after deciding that the woman died domiciled in New South Wales, held that her capacity to make the notarial contract was governed by English law, as being the law of her pre-marriage domicil. The consequence was that in his opinion her infancy rendered the contract 'void'. The reasoning which led the learned judge to this conclusion was not impressive. All that he did was to follow *Sottomayor v. De Barros* (No. 1),⁵ the *ratio decidendi* of which case was, in his opinion, to be found in two passages from the judgment. The passages that he deemed so authoritative were two *obiter dicta* of Cotton L.J. that are nowadays merely of academic interest; namely:

'It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicil';

¹ Wolff, pp. 366-7.

² (1887), 56 L.J. (N.S.), Ch. 637; 56 L.T. 737; 3 T.L.R. 558.

³ (1888), 13 App. Cas. 99.

⁴ [1899] 2 Ch. 569; reversed [1900] 2 Ch. 87.

⁵ (1877), 3 P.D. 1.

and,

‘As in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile.’

The decision is of little value on the question of capacity, for the right of the Englishwoman to dispose of her property by will was in no way restricted by the French contract upon which the children relied. As Dr. Morris has said:

‘If a woman makes an ante-nuptial contract which merely excludes *communauté des biens* and gives her full powers of disposition, it is difficult to see how the children of the marriage can complain if they take nothing under the will.’¹

The decision, in other words, would have been the same had she been of full age when she made the contract.

The facts of *Cooper v. Cooper*,² a Scottish appeal to the House of Lords, were as follows:

*Cooper v.
Cooper*
(ii)

A domiciled Irishwoman, 18 years of age, made an ante-nuptial contract at Dublin with her intended husband, a domiciled Scotsman, by which she purported to relinquish the proprietary rights that she would be entitled to under Scottish law upon the death of her husband. Both parties contemplated, in accordance with what proved to be the fact, that the matrimonial home would be established in Scotland. The husband died thirty-five years after his wife attained her majority. Upon his death she sued to set aside the contract on the ground that at the time of its execution she was a minor by Irish law.

It was held that the woman's capacity must be governed by the law of Ireland, since that country was not only her domicile but also the place where the contract was made. Lord Halsbury appears to have chosen the *lex domicilii* as such, but Lord Watson and Lord Macnaghten refused to consider what law would have applied had the country of domicile and the place of contracting been different. Lord Macnaghten rejected the notion that Scottish law, as being the law of the matrimonial domicile, applied, saying:

‘It is difficult to suppose that Mrs. Cooper could confer capacity upon herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicile.’

¹ 54 L.Q.R. 81; see also his *Cases on Private International Law*, 419.

² (1888), L.R. 13 App. Cas. 88.

In any event the decision is not readily explicable. By Irish law, as well as by English law, a marriage settlement is voidable, in the sense that it is treated as valid unless repudiated by the infant within a reasonable time after the attainment of majority.¹ Since there had been no repudiation within thirty-five years after that event, why was the settlement not valid even by the infant's pre-marriage *lex domicilii*? The true explanation seems to be that the House of Lords considered Scots law as well as Irish law to be a governing factor. By Irish law she might repudiate the contract or leave it in operation. By Scots law, the law of her new domicile, she could do nothing but repudiate it, since to ratify it or to leave it unrepudiated would constitute a gift that was revocable as being a donation *inter virum et uxorem*.² The decision, therefore, does not support the view that capacity to make a marriage settlement depends upon the *lex domicilii* at the time of the contract.

Viditz v. O'Hagan is a curious case, in which the facts were these:

(iii)

A domiciled Englishwoman, under twenty-one years of age, made a marriage settlement at Berne in view of her approaching marriage with a domiciled Austrian. The settlement was voidable by English law; i.e. it could be rescinded by the settlor after attaining her majority, though it would become irrevocable if not rescinded within a reasonable time after that event. The rule of Austrian law, the law of the matrimonial domicile, was that the husband and wife might revoke the settlement at any time. Twenty-nine years after the settlement, i.e. long after it had become irrevocable by English law, the husband and wife executed an instrument in the Austrian form by which they exercised the right of revocation. They then brought the present action against the English trustees claiming a declaration that the settlement had been annulled. It was held by the Court of Appeal that they were entitled to the declaration, since the power of revoking the settlement was a matter for Austrian law.

In other words, by English law the wife could repudiate the contract, provided that she did so within a reasonable time after attaining her majority; by Austrian law, to which she later became subject, she could always repudiate it. Therefore the joint operation of the two laws rendered effective what the parties had done.

¹ *Edwards v. Carter*, [1893] A.C. 360.

² *Morris, Cases on Private International Law*, p. 418, citing Lord Lindley in *Viditz v. O'Hagan*, [1900] 2 Ch. 87, at pp. 96, 98.

³ [1900] 2 Ch. 87.

Neither *Cooper v. Cooper* nor *Viditz v. O'Hagan*, then, justifies the view that the *lex domicilii* of each party governs capacity, for if this were the law the contract in each case would have been valid as not having been repudiated within a reasonable time.

✓ Formal validity. What is the appropriate legal system which determines the forms and solemnities that must be observed in the case of a marriage settlement? If, for instance, an Englishwoman marries a man domiciled in one of those Continental countries where such a contract is void unless made by notarial act, and she wishes to make a settlement with ordinary English limitations, it is important to know whether the English or the foreign form must be followed. The proper course is to execute the settlement as an English deed and then to re-execute it as a notarial act, but if this is not done a difficult question arises. If the deed is executed in the foreign country it neglects the forms required by the *lex loci contractus*; if in England, it requires the parties to act under a transaction which is void of effect by the law of the matrimonial domicile.¹

What law governs form of contract?

Although the traditional view formerly was that a contract must observe the forms required by the *lex loci contractus*, it is now accepted that formalities, like essential validity, are governed by the proper law.² The form required by the *lex loci contractus* is sufficient but not essential. The English cases would clearly appear to show that in the case of marriage contracts relating to property it is sufficient to adopt the formalities of the proper law as an alternative to those of the *lex loci*.³

Form of proper law sufficient

The exact point arose in *Van Grutten v. Digby*.⁴

Van Grutten v. Digby

Prior to a marriage between an Englishwoman and a domiciled Frenchman, a deed of settlement in the English form and containing the usual English limitations was executed at Dunkerque. The settlement was wholly void by French law, since it had not been executed before a notary public. Five years later the husband filed a bill in Chancery claiming that, owing to the formal invalidity of the contract by French law, the settled property was subject to the doctrine of community of goods.

Lord Romilly held, however, that the contract was binding upon both parties.

'I hold it to be the law of this country', he said, 'that if a foreigner and an Englishwoman make an express contract previous to marriage,

¹ Westlake, pp. 77-78.

² *Supra*, pp. 236-8.

³ As to what is the proper law see *infra*, pp. 546-8. ⁴ (1862), 31 Beav. 561.

and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then, and in that case, this court will administer the law on the subject as if the whole matter were to be regulated by English law.¹

There are other decisions to the same effect.²

Proper law
governs
essential
validity

✓ *Essential validity*. The essential validity of a settlement, whether voluntary or made in consideration of marriage, is governed by its proper law, i.e. the law of the country with which it is most closely connected and to which, therefore, it must be assumed that the parties intended to submit themselves.³ No two cases are alike, but the nature of the inquiry is constant. Are the localizing factors, as disclosed by the particular facts and circumstances, more densely grouped in one country rather than in another? In which country do they preponderate? These factors include such matters as the matrimonial domicile in the case of a marriage settlement and the domicile of the settlor and the beneficiaries in the case of one which is voluntary; the nature and situation of the settled property; whether the form and contents of the document are appropriate to one law, but not to another; the domicile of the trustees; the place where the accounts, the shares and other *indicia* of title are kept; the country where the trust is administered. In the case of a marriage settlement there is, indeed, a presumption in favour of the law of the matrimonial domicile, but this may well be rebutted by other circumstances.⁴

*In re
Fitzgerald*

Since each case has its own peculiarities, it must suffice to contrast two decisions as illustrative of the manner in which the courts solve the problem. In the first of these, *In re Fitzgerald, Surman v. Fitzgerald*,⁵ the facts were as follows:

Upon a marriage in Scotland between a domiciled Englishman and a domiciled Scotswoman, a marriage settlement was made in Scotland in Scottish form dealing with the wife's property. Most of the trustees were domiciled Englishmen. The settlement provided that the husband, if he survived his wife, should take an alimentary life interest in the property. An alimentary interest in Scottish law means one which can

¹ At p. 567.

² *Watts v. Shrimpton* (1855), 21 Beav. 97; *In re Barnard, Barnard v. White* (1887), 56 L.T. 9; *In re Bankes*, [1902] 2 Ch. 333.

³ *In re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *In re Bankes*, [1902] 2 Ch. 333; *Chamberlain v. Napier* (1880), 15 Ch.D. 614; *Iveagh v. Inland Revenue Commissioners*, [1954] Ch. 364 (voluntary settlement).

⁴ *In re Fitzgerald, supra*.

⁵ At p. 587.

neither be alienated by the life tenant nor seized in execution by his creditors. Such an interest is void by English law. The husband survived his wife, having mortgaged his life interest to English creditors. The question to be decided was whether the creditors were entitled to satisfaction out of the life interest.

The answer to this question depended upon whether the settlement was to be construed according to English law, which was the law of the matrimonial domicile, or according to the law of Scotland. It was held by a majority of the Court of Appeal that Scottish law must govern, since it was to that law that the parties intended to submit themselves. Cozens-Hardy L.J. said:

‘As a general rule the law of the matrimonial domicile is applicable to a contract in consideration of marriage. But this is not an absolute rule. It yields to an express intention that some other law shall apply. . . . It is not necessary that there should be an express stipulation. It is sufficient if the court arrives at the conclusion that the parties in fact contracted with reference to some law other than that of the matrimonial domicile.’¹

Vaughan Williams L.J. said:

‘It is the intention of the parties, gathered from the terms and circumstances of the contract, which determines the law which governs it, and in my judgment the Scotch form of this contract, coupled with the fact that Miss Lockhart, at the time of the marriage, was a domiciled Scotswoman, and that the property, the subject of settlement, came from her family, is sufficient to displace the prima facie presumption that the law of the matrimonial domicile is to govern the contract.’²

The proper law will not, of course, be applied if it conflicts with public policy or good morals as understood in England, but though this point was taken the Court of Appeal held that there was nothing immoral or opposed to public interest in the Scottish rule that an inalienable life interest may be given to a man.

A more recent and perhaps more controversial decision is that of the Court of Appeal in *Duke of Marlborough v. A.-G.*³

*Duke of
Marl-
borough v.
A.-G.*

In 1895, upon the marriage in New York of the ninth Duke of Marlborough to Miss Vanderbilt, a minor at the time, the wife's father brought into the settlement two and a half million dollars, and covenanted to settle 100,000 dollars during the joint lives of himself

¹ At p. 588.

² At p. 594.

³ *Duke of Marlborough v. A.-G.*, [1945] Ch. 78. See a criticism of the decision by Morris, 61 *L.Q.R.* 223-4.

and the wife, and to pay a further two and a half million dollars on his death. One trustee was English, the other American. No English property was brought into the settlement. Throughout the marriage the funds remained invested in American securities, though there was power to buy English securities. The trust was always administered in America. The question before the court upon the death of the Duke in 1934 was whether succession duty was payable to the Crown in respect of the settled funds.

The court held, first, that in the case of a marriage settlement succession duty is exigible only if the proper law of the settlement is English; secondly, that the proper law in the instant case was English. In the opinion of the court, the English form of the settlement, the power to invest in English securities, and the establishment of the matrimonial domicile in England were in themselves sufficient to justify the second finding. But there were said to be further considerations which excluded 'all possible doubt'. These were, a covenant by the husband and wife to obtain the consent of the Chancery Division to the settlement under the Infants Settlements Act, 1855, and two subsidiary provisions in the settlement, which, though familiar to English law, were meaningless according to the law of New York.¹

III. ASSIGNMENT ON DEATH

English
doctrine as
to transfer
of property
on death

The modern legal systems that have originated in English law differ fundamentally from those in which the doctrines of Roman law prevail with regard to the procedure by which property is administered after the death of its owner.² In England the only person entitled to deal with the property is he to whom a grant has been made by some public authority. This grant of the right of administration is made, according to the circumstances, to either an executor or an administrator. It is made to:

- an executor, when some person has been appointed as such by the will; or to
- an administrator *cum testamento annexo*, when a will has omitted to appoint an executor, or when the appointment fails, as, for instance, by the death or renunciation of the executor; or to
- an administrator, when the deceased has died intestate.

¹ These were (a) a reference to 'the statutory power of appointing a new trustee', and (b) a special indemnity given to the trustees 'in addition to the indemnity given by law to trustees'.

² Westlake, pp. 107-8.

The executors and administrators, or, to use a comprehensive expression, the personal representatives, become subject to two distinct duties. First, they must clear the estate of liabilities by the payment of funeral expenses and debts; secondly, they must distribute the residue of the estate among the beneficiaries according to the limitations of the will or the rules of intestacy. These two functions, debt-administration and beneficial distribution, are governed by different principles of private international law.

On the Continent, however, in the rare case where personal representatives are appointed, their duties and functions are generally of a supervisory nature widely different from those of their English counterparts.¹ The general Continental rule is that the entire property of a deceased person passes directly to his heirs, testate or intestate, or to his universal legatee, subject, of course, to their acceptance. In accordance with the maxim *hereditas est successio in universum ius quod defunctus habuit*, these successors, broadly speaking, continue the existence of their predecessor.² For instance, unless they accept the inheritance with the benefit of an inventory, their liability for the debts of the deceased is not limited to the assets but is enforceable against their private property.

Thus the striking difference between English and Continental practice is that in the latter case the property passes on death directly to the successor, but that in England it cannot be dealt with by anyone without a public grant.³ It is important, however, to observe at once that the automatic transfer recognized by Continental systems of law can have no operation upon property of the deceased situated in England. Succession to movables is governed by the *lex domicilii* of the deceased, but, no matter what that domicile may be, nobody can rightfully and effectually obtain possession of movable property situated

Continental doctrine

English grant essential for assets in England

¹ See, for example, *In re Achilopoulos*, [1928] 1 Ch. 433, 435.

² Distinguish the English personal representative, who, strictly speaking, does not represent the deceased at all. 'He claims what is termed the *glans caduca*, not the acorn on the tree, but the acorn which has fallen on to the ground from the tree'; per Kekewich J., *In re Barnett's Trusts*, [1902] 1 Ch. 847, 857.

³ But the Revenue Act, 1889, s. 19 provides that where a policy of life insurance has been effected by a person who dies domiciled elsewhere than in the United Kingdom, a grant of representation shall not be necessary to establish the right to receive the money payable; see *Haas v. Atlas Assurance Co. Ltd.*, [1913] 2 K.B. 209, where Scrutton J. gives the genesis of the provision. For another case where no grant is necessary, see *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341; *infra*, p. 557.

in England unless he gets an English grant of probate or of administration.¹ Authority to administer English assets requires without exception an English grant.

(a) *Administration of assets*

The problem to be discussed

The main problem that concerns us here is the position of an administrator, using that word to include English personal representatives and the Continental heir or universal legatee, as regards his title to property belonging to the deceased, and his right to sue or his liability to be sued in respect of obligations concerning the deceased. First, however, we must speak of the jurisdiction of the English court to grant administration.

(i) *Jurisdiction of English court to grant probate or administration.*

Jurisdiction depends, not on domicile, but on existence of local assets

One of the cardinal rules of private international law, as we shall see later, is that the movable property of a deceased person, so far as concerns either testate or intestate succession, is regulated by the law of that country in which he died domiciled. It might be thought, therefore, that the courts of that domicile have jurisdiction to make a grant of administration, merely on the ground of domicile and regardless of whether there are assets actually within the jurisdiction. Theoretically this principle is tenable, but there are two facts which militate against its application.

First, such a grant would be ineffective if there were no assets within the jurisdiction.

Secondly, the jurisdiction of the old ecclesiastical courts, of which the modern Court of Probate is the successor, was universally founded upon the presence within the jurisdiction of movables belonging to the deceased.

The rule, in fact, for many years has been that an English court can grant administration only if there is property in England,² though it now has statutory authority to make a grant notwithstanding that the deceased left no estate.³

How situation of assets determined

Except in the case of tangible movables there may be some difficulty in establishing the situation of property, especially in the case of *choses in action* such as debts and shares. For the

¹ *New York Breweries Co. v. A.-G.*, [1889] A.C. 62. It should be noted, however, that an executor derives his title from the will, not from the grant of probate.

² *Evans v. Burrell* (1859), 28 L.J.P. & M. 82; *In the Goods of Tucker* (1864), 34 L.J.P. & M. 180; Dicey, Rule 76.

³ Administration of Justice Act, 1932, s. 2 (1); *In the Estate of Wayland*, [1951] 2 All E.R. 1041.

purposes of jurisdiction to make a grant of probate or administration, however, it has long been settled with respect to *choses in action* and titles to property that judgment debts are assets where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, where the debtor resides at the time of the testator's death.¹ Securities, such as bonds, promissory notes and bills of exchange which are transferable by delivery only, are assets if situated in England.² A share of stock, transferable only by registration, is situated, not in the place where the certificates happen to be, but in the country where the shares may effectively be dealt with as between the shareholder and the company, i.e. in the country where registration must be effected.³

Who are the persons in whose favour this jurisdiction ought to be exercised? A case that commonly arises is where a person dies domiciled abroad, leaving the bulk of his property in the foreign country and a smaller amount in England. The ideal here, just as in the case of bankruptcy, is to have one administration in the domicile for the whole of the property, but such principle of unity is not found in practice and is attainable only by international agreement. A separate grant of administration must be obtained from the English court with regard to the property in England. In such a case the person whose right to act is derived from the *lex domicilii* is known as the principal administrator, the person who is grantee under English law is called the ancillary administrator.

To whom
will the
grant be
made?

The usual course in England has long been to follow the law of the domicile and to make the English grant either to the person who has been selected in the domicile to perform the duties of administration, or to the person who is entitled by that law to administer the estate.⁴ In exceptional circumstances a grant may be made to the person who would have been entitled had the deceased died domiciled in England.⁵ Any instrument, though not a will strictly so called, will be admitted to probate

Person
appointed
in the
domicil

¹ *A.-G. v. Bouzwens* (1838), 3 M. & W. 171, 191, *per* Lord Abinger.

² *Winans v. A.-G.* (No. 2), [1910] A.C. 27.

³ *Brassard v. Smith*, [1925] A.C. 371; *Erie Beach Co. v. A.-G. for Ontario*, [1930] A.C. 161; *A.-G. v. Higgins* (1857), 2 H. & N. 339; *R. v. Williams*, [1942] A.C. 541; *supra*, p. 508.

⁴ *In the Goods of Smith* (1868), 16 W.R. 1130; *In the Goods of Hill* (1870), 2 P. & D. 89; *In the Goods of Earl* (1867), L.R. 1 P. & D. 450; *In the Estate of Yahuda*, [1956] 3 W.L.R. 20.

⁵ *In the Goods of Gustav Kaufman*, [1952] P. 325.

if it is regarded by the *lex domicilii* of the deceased as a valid disposition of movables, as, for example, a friendly partition made by the members of the former reigning family in Romania.¹ Lord Penzance stated the practice in these words:

'I have before acted on the general principle that where the court of the country of the domicil of the deceased makes a grant to a party, who then comes to this court and satisfies it that, by the proper authority of his own country, he has been authorized to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets.'²

The court, however, has jurisdiction to make a grant to some other person, such as a creditor, if the domiciliary representative or heir takes no steps to prove the will or to obtain letters of administration.³

Foreign executor no right to demand English grant But the domiciliary executor or heir has no absolute right to administer the English assets. The court has a discretion, and although there are few cases where it refuses to follow the foreign grant, it will certainly do so if the foreign grantee is incompetent according to English law to act as administrator. Thus no grant will be made to an infant.⁴

The present practice is set out in the Non-Contentious Probate Rules, 1954,⁵ and in two directions issued by the Senior Registrar in 1953⁶ and 1957.⁷

(ii) *Duty of administrator acting under an English grant.*

Lex fori governs administration Where an ancillary administrator has been authorized to deal with the English assets of a person dying domiciled abroad, the rule is that, though beneficial distribution is

¹ *In re Queen Marie of Romania*, [1950] W.N. 457; 94 S.J. 673.

² *In the Goods of Hill*, *supra*; *In the Estate of Humphries*, [1934] P. 78.

³ *In the Estate of Leguia*, [1934] P. 80. See also the Consular Conventions Act, 1949, S. 1 (1) which allows a grant of administration to be made to the consular officer of a foreign State where the executor or other such person is a national of that State and is not resident in England and where no other application is made by a person duly authorized by power of attorney. A 'foreign State' means one with which a consular convention has been concluded and so declared by Order in Council.

⁴ *D'Orléans (Duchess)*, *In the Goods of* (1859), 1 Sw. & Tr. 253; presumably, *In the Goods of Da Cunha* (1828), 1 Hagg. Eccl. 237, would not now be followed.

⁵ S. 9, 1954, No. 796. The relevant rules (18, 29, 30, 34, 42, 52, and 53) and the directions referred to in the following two notes are conveniently set out in Webb and Brown, *A Casebook on the Conflict of Laws*, pp. 418 et seqq.

⁶ Printed in [1953] 1 W.L.R. 1237.

⁷ Printed in [1957] 1 W.L.R. 462.

dependent upon the *lex domicilii*, the administration of the assets is governed exclusively by English law.¹

'The principle is,' said Warrington L.J., 'that the administration of the estate of a deceased person is governed entirely by the *lex loci*, and it is only when the administration is over that the law of his domicil comes in.'²

Pearson J. illustrated the law more fully in an earlier case. He said:

'Therefore, if a man dies domiciled in England, possessing assets in France, the French assets must be collected in France and distributed according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. But if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected must be distributed according to the law of England.'³

Thus the duty of an executor who receives a grant of ad-
 ministration from the English court is to pay all debts, whether
 domestic or foreign, according to the rules of English law. No
 distinction must be made between English and foreign
 creditors, no regard must be had to the corresponding rules
 of the *lex domicilii* of the deceased. A foreign creditor seeking
 payment here must take the law of England as he finds it. He
 can neither claim an advantage which his own or any other
 foreign law may allow him, nor can he be deprived of an advan-
 tage which belongs to him by English law though not by the
lex domicilii of the deceased. In particular, the priority of debts⁴
 and their extinction by lapse of time⁵ are matters to be governed
 exclusively by English law. If, for instance, certain foreign
 debts owed by the deceased are statute-barred by English law
 but not so barred by the *lex domicilii*, the principal administra-
 tor in the country of the domicil is not entitled as of right to
 demand that the surplus English assets shall be handed over
 to him in order to satisfy the claims of the foreign creditors.⁶

Foreign
creditors
entitled to
payment
according
to English
law

¹ Westlake, s. 110; Story, s. 524; *In re Kloebe* (1884), 28 Ch.D. 175; *In re Lorillard*, [1922] 2 Ch. 638; *Preston v. Melville* (1840), 8 Cl. & Fin. 1, 12-13; *Enohin v. Wylie* (1862), 10 H.L.C. 1, 13-14, *per* Lord Westbury.

² *In re Lorillard*, *supra*, at pp. 645-6. By *lex loci* he meant *lex fori*.

³ *In re Kloebe* (1884), 28 Ch.D. 175, at p. 177. By 'distributed' the learned judge, of course, was referring not to the ultimate distribution among the beneficiaries, but to the distribution of the assets among the creditors.

⁴ *In re Kloebe* (1884), 28 Ch.D. 175.

⁵ *In re Lorillard*, [1922] 2 Ch. 638.

⁶ *In re Lorillard*, *supra*.

The only difficulty is to determine at what stage administration ends and beneficial distribution begins.¹ It has been held, for instance, that though all debts have been paid and a net residue ascertained, yet, if the beneficiaries are infants, the right of an administrator under the Administration of Estates Act² to postpone the realization of the English assets is still exercisable, since postponement is a matter of administration.³ It has also been held that a rule of the *lex domicilii* restricting the authority of an executor to a period of one year from the death of the testator must be disregarded in the English administration.⁴

Disposal
of surplus
assets

After all debts have been paid by an ancillary administrator according to the law of England, the usual procedure is for him to remit any surplus assets to the principal administrator, in order that they may be distributed among the beneficiaries according to the *lex domicilii*.⁵ But this remission of assets is not a matter of course. It is within the discretion of the English court whether surplus assets shall be remitted to the domicile for purposes of beneficial distribution or whether that distribution shall be made from England. The sole function of the *lex domicilii* with regard to English assets is to regulate their beneficial distribution, not to allocate them in payment of debts. An immoderate use was made of this rational principle in the much debated case of *In re Lorillard*.⁶

The testator, domiciled in New York, died leaving assets and creditors both in England and America. Administration proceedings were taken in both countries. The New York assets were exhausted, leaving unpaid certain creditors whose debts were statute-barred by English law but not so by the law of New York. There was a surplus of English assets after all creditors entitled under English law had been paid.

Eve J. made an order that if the American creditors did not within two months establish that their debts were payable by English law, the executor must not remit the assets in this country to the New York executor, but must distribute them

¹ *In re Kehr*, *Martin v. Foges*, [1952] Ch. 26.

² S. 33.

³ *In re Wilks*, [1935] Ch. 645; *supra*, p. 50. Cf. *Re Northcote's Will Trusts*, [1949] 1 All E.R. 442; *Re Kehr*, [1951] 2 All E.R. 812; [1952] Ch. 26.

⁴ *In the Estate of Goenaga*, [1949] P. 367. See 3 *I.L.Q.* 243 where it is shown that the decision, though correct in principle, is irreconcilable with *Laneuville v. Anderson* (1860), 2 Sw. & Tr. 24.

⁵ *In re Achilopoulos*, [1928] 1 Ch. 433.

⁶ [1922] 2 Ch. 638. The decision has been severely criticized by Berriedale Keith in the 5th edition of Dicey, pp. 984-7, and by Nadelmann in 49 *Michigan Law Review*, 1149.

among the beneficiaries. The Court of Appeal refused to interfere with the exercise by Eve J. of his discretion.

It certainly seems a strange exercise of judicial discretion to enrich beneficiaries at the expense of creditors entitled to payment in the place of the principal administration, for in the words of one commentator a testator should be assumed to be honest and 'to desire that all his legal debts as reckoned by the law of his domicile shall be disposed of before the estate is available for beneficiaries, and the English Court of Chancery should exercise its equitable jurisdiction to secure this just principle'.¹ In any event, this attack on the creditors will not always succeed. It succeeded in the instant case because the beneficiaries were resident in England, but had they resided in New York or, indeed, in any other country where statutes of limitation are not classified as procedural, they would have been liable at the suit of the creditors to disgorge what they had received.

On another view of the matter, however, the decision was probably unavoidable, for it is a rigorous rule of English private international law that a foreign statute of limitation must be totally ignored.² The pious hope may, therefore, be expressed that the decision will be restricted by the courts to the single case of foreign statute-barred debts, but this is by no means certain, for it has been judicially suggested that in every form of administration it indicates the principle upon which foreign liabilities should be accepted.³

(iii) *Title of administrator under an English grant.*

✓ Although the theory may be that an English grant extends to property no matter where situated, it is obviously of no practical importance, for whether the administrator is entitled to the property of the deceased in a foreign country must necessarily depend upon the local law. The one certainty is that an administrator acting under an English grant, who does succeed in obtaining property in a foreign country, is accountable for it as administrator in England.⁴

No title to
foreign
assets

But
accountable
if he
recovers
them

¹ Berriedale Keith, Dicey (5th ed.), p. 985.

² *Infra*, pp. 685 et seqq.

³ *Government of India v. Taylor*, [1955] A.C. 491, at p. 509, per Lord Simonds; same case *sub. nom. In re Delhi Electric Supply and Traction Co. Ltd.*, [1954] Ch. 131, at p. 161, per Evershed M.R., pp. 165-6, per Jenkins L.J. On this aspect of the case see 3 *J. & C.L.Q.* 504-6.

⁴ *Dowdale's Case* (1604), 6 Co. 47; *Stirling-Maxwell v. Cartwright* (1879), 11 Ch.D. 522; Westlake, s. 103.

Title to property reaching England after death The title of the administrator extends not only to property situated in England at the death of the deceased, but also to all property which comes to England thereafter.¹ As Parke B. said in *Whyte v. Rose*:²

‘Suppose after a man’s death his watch be brought to England by a third party, could such party in answer to an action of trover by an English administrator plead that the watch was in Ireland at the time of his death?’

Property, however, which comes to England after the death of the deceased does not pass to the administrator under an English grant if it has previously been appropriated abroad by an administrator acting under the foreign *lex loci*.³

(iv) } *Position of foreign administrator acting in England without an English grant.*

Foreign administrator liable if he intermeddles with assets The rule is absolute that the status of an administrator appointed by a foreign court is not recognized in England. His title relates only to property that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover by action property in England without a grant from the English court. If, without the support of an English grant, he succeeds in obtaining property in England, he is clearly liable as executor *de son tort* to account for the assets received.⁴

Does payment to foreign administrator discharge debtor? Since a foreign administrator has no right to sustain actions or to receive property in this country *qua* representative of the deceased, it would appear clear on principle that a debtor from whom he receives payment is not discharged from liability to an English administrator.⁵ As Story says,⁶ however, there is much room for discussion and doubt upon this matter. On the one hand, the domestic rule of English law is that ‘where an executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor, and shall alter the property’.⁷ On the other hand, there is

¹ Westlake, ss. 94-95; Dicey, Rule 97 (3).

² (1842), 3 Q.B. 493, 506.

³ *Currie v. Bircham* (1822), 1 Dowl. & Ry. 35; Story, s. 516; Westlake, s. 95; Dicey, Rule 97 (3).

⁴ Story, s. 514; Foote, p. 325; *New York Breweries Co. v. A.-G.*, [1899] A.C. 62. See *Beavan v. Lord Hastings* (1856), 2 K. & J. 724.

⁵ Westlake, s. 98; Dicey, p. 584.

⁶ S. 514.

⁷ *Randall v. Stevens* (1853), 2 E. & B. 630, 640; but see Foote, p. 325.

the undoubted fact that a foreign administrator, as such, has no authority to receive or otherwise deal with English assets.¹ There is no English case directly in point, but if a debtor had reasonable grounds for believing that the foreign administrator was the bona fide representative of the deceased, it would seem justifiable to depart from strict principle and to regard the payment as a valid discharge. The majority of the state courts in America adopt this view.²

But although a foreign administrator is not permitted to sue in England as the representative of the deceased, it has long been established that he may enforce by action a right which is personal to himself and which he is entitled to assert in his own individual capacity, even though it is connected with the estate that he is administering.³ If, for instance, the administrator in his official capacity recovers judgment abroad against a debtor, he has effectually reduced the debt into his possession,⁴ and he can sue on the judgment in England without taking out a separate administration.⁵ In *Vanquelin v. Bouard*:⁶

Foreign administrator may enforce right which belongs to him personally

A widow in France became donee of the universality of the succession of her deceased husband. By French law she was, as such donee, *personally* liable for her husband's debts and *personally* entitled to his property. She paid to an indorsee the amount of a bill of exchange which her husband had drawn, and later brought an action in England to recover this amount from the acceptor.

It was held that there were two grounds upon which the widow must succeed. First, the right that she sought to enforce was not one that formed part of the husband's estate at the time of his death but, since it arose from a payment made by her since the death, was a right which she had acquired personally. Secondly, her position as donee gave her, according to French law, a personal right to recover the sum from the acceptor.

The liabilities to which an administrator is subject are imposed upon him in his capacity as the lawful representative of the deceased, and since the status of a representative appointed abroad is not recognized in England, it follows that a foreign administrator as such is not liable to be sued in this country.⁷

Foreign administrator not liable to be sued in England

¹ Story, s. 514.

² Goodrich on *Conflict of Laws*, pp. 555-6; Wharton, 626a.

³ *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341.

⁴ Westlake, s. 97.

⁵ *In re Macnichol* (1874), L.R. 19 Eq. 81.

⁶ (1863), 15 C.B. (N.S.) 341.

⁷ *Beavan v. Lord Hastings* (1856), 2 K. & J. 724; Story, ss. 513, 514B; Westlake, s. 101; Dicey, Rule 105, p. 585.

This is so even though he brings foreign assets to England. He cannot sue, neither can he be sued, in his capacity as administrator.

Adminis-
trator liable
on personal
trans-
actions

But just as a foreign administrator can enforce in England a right which attaches to him personally, so he can be sued upon a claim which is sustainable against him, not in his representative, but in his personal, capacity.¹ An action will not lie against an administrator if it is based upon a transaction entered into by the deceased, but it will lie upon a transaction effected by the administrator after taking office. Thus, for instance, he will be liable upon any contract connected with the winding-up of the estate that he makes in England.² Indeed, the liability in this country of a foreign executor would seem to go further than this, for if in any way he has changed his character from that of an executor to that of a trustee he would seem to incur liability within the principle of *Penn v. Baltimore*.³

Scottish,
Irish, and
Colonial
grants

It must finally be noted that a grant of administration made in Scotland⁴ or in Northern Ireland⁵ may be resealed in England, and thus made effective with regard to English assets.⁶ Again, a grant made in any part of the British possessions, exclusive of the United Kingdom but inclusive of protectorates and mandated territories, to which the Colonial Probates Act, 1892, has been extended by Order in Council, may likewise be sealed in England.⁷ An Order in Council, however, is not made until the colony in question has made adequate provision for the recognition within its territory of English grants. Orders in Council may also be made extending

¹ Westlake, s. 100; Dicey, Rule 105, p. 585.

² See the American case, *Johnson v. Wallis* (1889), 112 N.Y. 230; Beale, ii. 740.

³ *Bond v. Graham* (1842), 1 Hare 482, 484; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453; for *Penn v. Baltimore* (1750), 1 Ves. 444, fully discussed *infra*, pp. 614-24.

⁴ Supreme Court of Judicature Act, 1925, s. 168 (1) (2). See *In re Howden and Hyslop's Contract*, [1928] Ch. 479.

⁵ Supreme Court of Judicature Act, 1925, s. 169, as amended by Administration of Justice Act, 1928, s. 10.

⁶ The resealing does not relate back to the original grant. For the purpose of suing in England the executor is not an executor until the resealing is effected, *Burns v. Campbell*, [1952] 1 K.B. 15.

⁷ Colonial Probates Act, 1892; extended to protected States and mandated territories by Colonial Probates (Protected States and Mandated Territories) Act, 1927, s. 1. For a full list of the territories for which Orders have been made see Halsbury's *Laws of England*, vol. 16, p. 260, note (c). See also the annual supplement.

the provisions of the Act to any foreign country in which Her Majesty has jurisdiction.¹ If the deceased died domiciled in England, probate or letters of administration may be resealed in the High Court in Northern Ireland² or in the Sheriff Court at Edinburgh.³

(b) *Beneficial distribution of movables*

Presuming that the estate has been cleared of debts, the next and final duty of the administrator is to distribute the property among those to whom it beneficially belongs. These persons vary according as the deceased dies testate or intestate.

(i) *Intestate succession.*

The rule has been established for some two hundred years that movable property in the case of intestacy is to be distributed according to the law of the domicile of the intestate at the time of his death.⁴ This law determines the class of persons to take, the relative proportions to which the distributees are entitled, the right of representation, the rights of a surviving spouse, the liability of a distributee for unpaid debts, and all analogous questions.

Lex domicilii governs succession

The fate of movables situated in England and belonging to an intestate who has left no relatives recognized as his successors by the law of his domicile has already been fully discussed.⁵ Summarily stated, the rule, which derives from the principle that the authority of the *lex domicilii* is rigorously confined to questions of succession, is this:

Caducary rights

If, by the *lex domicilii*, the movables pass to the *fiscus* or some other body in the domicile by way of succession, English law gives effect to this ruling;⁶ if, on the other hand, they are seized by some body in the domicile as being *res nullius*, they pass to the English Crown as *bona vacantia*.⁷ In this latter case, there is no question of succession to be referred to the *lex domicilii*.

¹ (1913), 3 & 4 Geo. V, c. 16.

² Probate and Letters of Administration Act (Ireland), 1857, s. 94; Northern Ireland (Miscellaneous Provisions) Act, 1932, s. 2. English grants cannot be resealed in Eire, nor is the reverse process possible.

³ Confirmation of Executors (Scotland) Act, 1858, s. 14.

⁴ *Pipon v. Pipon* (1744), Amb. 25; Westlake, ss. 59, 120; Story, s. 481; Dicey, p. 598.

⁵ *Supra*, pp. 57-59.

⁶ *In the Estate of Maldonado*, [1954] P. 223.

⁷ *In re Barnett's Trusts*, [1902] 1 Ch. 847; *In the Estate of Musurus*, [1936]

2 All E.R. 1666.

(ii) *Testamentary succession.*

Lex domicilii of testator governs

The general rule established both in this country and in the U.S.A. is that testamentary succession to movables is governed exclusively by the law of the domicil of the deceased as it existed at the time of his death.¹ When a testator dies domiciled abroad leaving assets in England, it is true that probate must be taken out in England, and it is also true that the assets must be administered in this country according to English law, but nevertheless all questions concerning the beneficial succession must be decided in accordance with the law of the domicil. The duty of the executor is to ascertain who, by the law of the domicil, are entitled under the will, and that being ascertained to distribute the property accordingly.² It is necessary, however, to deal separately with the various questions that arise in testamentary succession.

Capacity of testator governed by *lex domicilii*

J(a) *Capacity.* The capacity of a testator is determinable by the law of his domicil. The meaning of this statement is clear enough if he is domiciled in the same country at the time both of his making the will and of his death. If this is a foreign country, his capacity by English law is immaterial. Thus in a case decided when a *feme-covert* possessed no testamentary capacity at common law,³ the English court granted probate of the will of a married woman, a domiciled Spaniard, upon proof that by Spanish law a wife was empowered to bequeath her movables.⁴

What is the *lex domicilii*?

But what is the position where the testator has changed his domicil after making his will? Is the determinant of the governing law his domicil at death or at the time when he made the will? There is no decision on the matter, but the majority of jurists, however, hold that it means the former.⁵ This is curious, for by English internal law, and presumably by other municipal systems, the decisive moment for testing

¹ A subsequent change in the *lex domicilii* is of no effect: *Lynch v. Provisional Government of Paraguay* (1871), L.R. 2 P. & D. 268.

² *Enohin v. Wylie* (1862), 10 H.L.C. 1, 19; Story, s. 466.

³ Until the Married Women's Property Act, 1882, a married woman could dispose by will of her separate estate or of a power of appointment, and she could bequeath personality with the assent of her husband, but otherwise she had no testamentary capacity.

⁴ *In the Goods of Maraver* (1828), 1 Hagg. Ecc. 498.

⁵ Westlake, s. 86; Foote, pp. 256-7; Beale, s. 306 (1); Goodrich, p. 512; Stumberg, p. 381. *Contra*, Dicey, pp. 600-1; Theobald on *Wills* (10th ed.), p. 3; Savigny, Guthrie's translation, p. 232; Story, s. 465; Johnson, iii. 66; Wolff, pp. 581-2.

capacity is the time when the will is made. A will made by an infant or by a lunatic cannot be validated by subsequent events. No will can be valid unless it is valid when made. On principle it makes no difference that the subsequent event consists in a change of domicile to a new country where the law has a more favourable rule for capacity. For instance:

A domiciled Hungarian, twenty-two years of age, and therefore lacking testamentary capacity by Hungarian law, makes a will, but ultimately dies domiciled in England.

It is submitted that the will is void. What is invalid for incapacity in its origin can scarcely be automatically validated by the change of domicile. If, on the other hand,

a domiciled German, sixteen years of age, makes a will, as he is permitted to do by German law, but ultimately dies domiciled in England,¹

it is submitted that the will is valid. In fact it is difficult to disagree with the view that testamentary capacity, in the sphere of both internal law and private international law, is governed by the *lex domicilii* of the testator at the time when the will is made.²

Different considerations apply to the question of capacity Powers of appointment and capacity to exercise a testamentary power of appointment given by an English instrument to an appointor domiciled abroad. The obvious principle here is that, just as in the case where a testator disposes of his own property, capacity must be tested by the law of the appointor's domicile. There is indeed no doubt that, if the rule of this law on the matter is satisfied, the appointment is good. It is enough, whether the power is general or special, that the appointor is of full capacity by his own *lex domicilii*, even though he is incapable by the law that governs the instrument by which the power was created.³ But this does not conclude the matter. As will be seen when the question of

¹ Martin Wolff, s. 557.

² Theobald on *Wills* (10th ed. by J. H. C. Morris), p. 3; Burge (1st ed.), iv. 580, stated the rule to be that in the event of a change of domicile the testator must have capacity both at the time of making the will and at death. Graveson, on the other hand, suggests that the courts might be satisfied if the testator was *capax* either at the date of making the will or at the time of death; op. cit., p. 267. Cp. the case of a legatee, *infra*, p. 562.

³ *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391, where a testamentary exercise by a domiciled Frenchwoman aged nineteen was upheld. But the English instrument of creation provided that the appointment should be made by will 'executed in such manner as to be valid according to the law of' the appointor's domicile.

formal validity is considered,¹ the view taken by English law is that the instrument which creates the power, not the one by which the power is exercised, is the governing instrument, and that the appointor is a mere agent to carry out the wishes of the donor. The appointee takes under the instrument of creation, not under the will of the appointor. If capacity stands on the same footing as formal validity, it follows, therefore, that an appointment is valid if the appointor has capacity by the law that governs the instrument of creation, though he may be incapable by the law of his own domicil. It may well be objected that even if the appointor is regarded as merely the agent of the donor he should not be free to do what, according to the law to which he is subject, he is incapable of doing.² Nevertheless, the view is not unreasonable in the case of a special power, for here the appointor's function is to select the beneficiaries from the class already designated by the donor. He is in no sense disposing of his own property. But there is little to justify a reference to the law governing the instrument of creation in the case of a general power, for the appointor in such a case can scarcely be regarded as a mere agent to implement the wishes of the donor.

The correct rule probably is, therefore, that the testamentary exercise of a general power is invalid for want of capacity, unless the appointor is capable by his *lex domicilii*; but that in the case of a special power the exercise is valid if he is capable either by his *lex domicilii* or by the law that governs the instrument of creation.³

Capacity of
legatee

The capacity of a legatee to take a bequest is determined by the law of his domicil.⁴ This law, not the *lex domicilii* of the testator, determines, for instance, whether he is of full age or whether an unincorporate association is capable of receiving a legacy. In the case of *In re Hellman's Will*,⁵ however, the court did not apply the law of the legatee's domicil exclusively, but adopted the principle that where there are two conflicting laws as to capacity, that is selected which is most favourable to the *propositus*.

¹ *Infra*, pp. 571-3.

² Goodrich, p. 530.

³ For a full discussion of the whole subject see Dicey, pp. 631-2.

⁴ *In re Hellmann's Will* (1866), L.R. 2 Eq. 363; *In re Schnapper*, [1928] Ch. 420.

⁵ *Supra*. By German law the boy's father was entitled as guardian to receive the legacy. Lord Romilly M.R., however, refused to permit payment to him and ordered that during the minority the money should be treated as an infant's legacy; see Foote's criticism (op. cit., pp. 74-75) of this aspect of the decision.

A domiciled Englishman bequeathed legacies to each of the two children of a domiciled German. The children were a daughter aged 18 and a son aged 17. By German law girls attain majority on completing their eighteenth year; boys, on completing their twenty-second year.

It was held that the legacy to the daughter might be paid to her on her own receipt, since she was of age by her *lex domicilii*; and that the legacy might be paid to the son as soon as he attained majority according to English law or according to German law, whichever first happened.

§ (b) *Formalities*. Phillimore, writing in the early part of 1861,¹ accurately, if somewhat chidingly, stated the rule with regard to the system of law which governs the formal validity of a will. At common law the *lex domicilii* governs exclusively

'As to the form of the testament. The jurisprudence of the Continent wisely, justly and philosophically allows an option to a testator to adopt either (a) the form required by the *lex loci actus*; or (b) the form required by the *lex domicilii*. The adoption of either form is, as jurists say, facultative, not imperative, though the general maxim be *locus regit actum*.

'England and the North American United States unwisely, arbitrarily and unphilosophically compel the testator to adopt the form prescribed by the *lex domicilii*.²

The *lex domicilii* in question is the law of the testator's domicile at the time of his death. Until as late as 1830 it was probably true to say that the universal application of this principle was not recognized,³ for in *Stanley v. Bernes*⁴ Sir John Nicholl held that a will of movable property made according to English law by a British subject who died domiciled in Madeira was valid. This decision was, however, reversed by the High Court of Delegates. The exclusive authority of the law of the testator's last domicile was again affirmed by the Privy Council in the leading case of *Bremer (v.) Freeman*.⁵ In that case:

Fanny Calcraft, an Englishwoman domiciled at the time in France, made a will in Paris in the English form, executed according to the Wills Act, 1837, but not in accordance with the requirements of French law. She died domiciled in France. It was held that the will was invalid.

¹ i.e. before Lord Kingsdown's Act, which was passed later in the same year; *infra*, pp. 564 et seqq.

² Phillimore, *Commentaries upon International Law*, iv. 627-8.

³ See Lord Kingsdown's speech on the second reading of the Wills Act, 1861, in the House of Lords; Hansard, vol. 162, pp. 860-80.

⁴ (1830), 3 Hagg. Ecc. 373.

⁵ (1857), 10 Moo. P.C. 306.

under the Lord Kingsdown's Act

Lord Wensleydale, in delivering the judgment of the Court, said:

'The post-mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death, if he dies without a will; and it seems equally to follow that if the law of the country allowed him to make a will, the will must be in the form and with the solemnities which that law required.'¹

Difficulties
caused by
the rule

The hardship that may result from a rule so inflexible as this is obvious. A domiciled Englishman who wished to make a will while travelling abroad would be obliged to adopt the formalities prescribed by the Wills Act, 1837, but though it would be an easy matter with the help of a local lawyer to draft a document according to the law of the place where he happened to be, it might be impossible to obtain advice from an expert versed in English law. Again, it would be useless for an Englishman, prior to going abroad in search of a new domicile, to make his will in the English form, since it might be invalid should he die domiciled in a place where different forms are required. It was with a view to relieving British subjects from such difficulties that the Wills Act, 1861, commonly called Lord Kingsdown's Act, was passed.² The main object of this is to provide that a will which is good as to form according to the law of the country where it is made shall never be rejected for want of form. The *lex loci actus* is to be an alternative to the *lex domicilii* at death.

Principle
Rule
qualified
by Lord
Kings-
down's
Act

Wills of
British sub-
jects made
out of
United
Kingdom

The first section of the Act deals with wills made out of the United Kingdom and runs as follows:

'Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required by

- (i) the law of the place where the same was made; or
- (ii) the law of the place where such person was domiciled when the same was made; or

¹ At p. 358.

² For a trenchant criticism of the drafting of the Act see J. H. C. Morris in 62 *L.Q.R.* 173-6. For a Canadian redraft of the Act see 62 *L.Q.R.* 185, 328. For a new draft for England recommended by the Private International Law Committee, see Cmnd. 491 (1958). A convention on the matter was concluded in 1960 at the 9th session of the Conference on Private International Law at The Hague.

- (iii) the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin.'

If, therefore, a British subject, whose domicil of origin is in New South Wales, makes a will in Switzerland at a time when he is domiciled in France and ultimately dies domiciled in England, his will is formally valid by virtue of the section if it satisfies the requirements of any one of the following three laws,

- (i) Swiss law (*lex loci actus*), or
- (ii) French law (*lex domicilii* at time of execution), or the
- (iii) law of New South Wales (law of domicil of origin),

and it is valid at common law if it satisfies the requirements of

- (iv) English law (*lex domicilii* at death).

The restricted application of the section must, however, be observed. It is restricted to a will made out of the United Kingdom, a term which now includes no more than England, Scotland and Northern Ireland;¹ it deals only with the question of formal validity; it is confined to wills of British subjects; its operation is limited to personalty. As regards British nationality, it is indifferent whether the testator was a natural born or a naturalized subject,² but the status must have been possessed by him at the time when the will was made.³ It is presumably immaterial that he lost it later.⁴ 'Personalty' bears the ordinary meaning attributed to it by English internal law and thus includes, for example, leaseholds⁵ and land subject to a trust for sale but not yet sold.⁶

The second section of the Act deals with wills made by British subjects within one of the countries forming part of the United Kingdom. The section provides that:

'Every will made within the United Kingdom by any British subject (whatever may be his domicil at the time of execution or of death) shall

¹ Not Eire: Irish Free State (Consequential Adaptation of Enactments) Order, 1923; nor the Isle of Man, nor the Channel Islands; Royal and Parliamentary Titles Act, 1927, s. 2 (2). ² *In the Goods of Gally* (1876), 1 P.D. 438.

³ *Bloxam v. Favre* (1884), 9 P.D. 130; *In the Goods of Von Buseck* (1881), 6 P.D. 211.

⁴ So decided by the Supreme Court of British Columbia, *In re Colville*, [1932] 1 D.L.R. 47.

⁵ *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584. As to whether 'personal estate' includes a mortgage of freeholds see *In re Gauthier*, [1944] 3 D.L.R. (Canada), and article *ibid.* by Falconbridge.

⁶ *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80.

be formally valid as regards personal estate if executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.'

Thus if an Englishman, while on a visit to Edinburgh, makes a will there without witnesses, this holograph instrument, being recognized by Scottish law, must be admitted to probate in England.

This section has the same limited application as the first, but it is narrower in the sense that the only substitute it allows for the *lex domicilii* at the time of death is the *lex loci actus*. Under the first section, a will made in France according to English law by a British subject domiciled in England is valid, since it conforms to the law of the place where the testator was domiciled at the moment of execution. But a will made in England according to Scottish law, by a British subject domiciled in Scotland, is not validated by the second section, though it is, of course, valid under the general rule if the testator dies domiciled in Scotland.

Only one
law at a
time open
to testator

A testator, therefore, has certain choices open to him. He must, however, stand or fall by one of them. 'I am of opinion', said Lord Penzance, 'that, in determining the question whether any paper is testamentary, regard can be had to the law of one country only at a time.'¹ In the case from which these words are taken:

A testator, apparently domiciled in England, made a will in India, not properly executed according to the local law, and added a codicil at Florence. Neither was formally valid by the law of England or of Italy. He added a second codicil at Genoa. This was well executed according to Italian law, the *lex loci actus*.

The argument offered in support of the will being admitted to probate was to this effect: 'If you begin with Italian law you find a formally valid codicil. If you then turn to English law you find that the valid codicil, since it is endorsed on the will, operates as a republication of the will and thereby establishes it.' The court refused to combine the two laws in this way, and held that neither the will nor the codicil could be admitted to probate.

Effect of a
change of
domicil

It is now necessary to consider what effect is produced if a testator changes his domicil, after having made a will that was formally valid according to the testamentary law that governed him at the time of execution. For instance:

¹ *Pechell v. Hilderley* (1869), L.R. 1 P. & D. 673.

A French testator, while domiciled in France, makes an unattested will, valid according to French law, and later dies domiciled in England. Is the will void at common law as not having conformed to the *lex domicilii* at death? If so, is it saved by Lord Kingsdown's Act?

The conclusion seems inevitable that at common law such a change of domicil is fatal to the validity of the will. To hold otherwise would be to stultify the general common law principle that a will must satisfy the formalities of the testator's last domicil. Moreover, such a decision would be contrary to principle. As pointed out in a leading American case,¹ the essence of a will is that it is ambulatory until death, a mere inchoate transaction having no legal significance and creating no vested rights until consummated by death. If it were complete upon execution it could not, of course, be affected by a change of domicil, but since it does not become complete till death it is necessarily affected by that system of law which governs the testamentary dispositions of the deceased. Story does not hesitate to pronounce that a change of domicil, such as instanced above, invalidates a will.² There are several American decisions to this effect.³

Effect of
common
law

In England, unfortunately, there is no decision in which the exact issue has been raised, but there is little doubt that a court would stand firm by the rule that the *lex domicilii* at death must be satisfied. This is implicit in the judgment of the Privy Council delivered by Lord Wensleydale in *Bremer v. Freeman*;⁴ though it was there pointed out that it was unnecessary to decide the question. It was there said:

'Their Lordships, however, do not wish to intimate any doubt that the law of the domicil at the time of the death is the governing law.'⁵

The question next arises whether a will which would thus be invalidated at common law by a change of domicil is saved by Lord Kingsdown's Act. That Act, in its third section, provides as follows:

Effect of
Lord
Kings-
down's
Act

No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same.

¹ *Moultrie v. Hunt* (1861), 23 N.Y. 394; Lorenzen, *Cases of Conflict of Laws*, p. 780.

² S. 743.

³ *Moultrie v. Hunt*, *supra*; Goodrich on *Conflict of Laws*, p. 514.

⁴ (1857), 10 Moo. P.C. 306.

⁵ At p. 359.

Effect on wills of British subjects In the first place it is clear that, independently of this section, the formal validity of a will made by a *British subject* under the first or the second section is entirely unaffected by a subsequent change of domicil. Those sections provide that a will, which is formally valid according to one of the systems of law specified, shall be admitted to probate, 'whatever may be the domicil of such person . . . at his or her death'. When once a valid will has been made under either section, it is to remain valid.

Effect on wills of foreigners The first two sections, however, are expressly limited to British subjects, and the difficult question is whether the third section can have any operation upon the will of a foreigner. If a foreign testator while domiciled in France makes a holograph will and later dies domiciled in England, does that section save the will from failure? The obvious comment to pass on this suggestion is that an Act entitled 'An Act to amend the laws with respect to wills of personal estate *made by British subjects*' cannot apply to foreigners, but as against this there are dicta to the effect that, though the title is part of a statute and may be examined in considering the scope of the enactment, it is not of much account on a question of construction.¹ The true view, however, probably is that, though the title cannot be used to control express provisions of an Act, yet, wherever there is any doubt about the meaning of a section, the Act should be construed consistently with the title.²

Genesis of Lord Kings-down's Act It thus becomes relevant to discover the object of the third section. The circumstances which gave rise to the Act are well known.³ They were connected with Fanny Calcraft's will, which was at issue in the case of Bremer v. Freeman.⁴ Fanny Calcraft, an Englishwoman resident in Paris, who had made a will conformably to English law, was held by the Privy Council to have died intestate because, being domiciled in France, she had not satisfied the formalities of French law. This decision was given in the face of an opinion stated on oath by ten advocates of the highest repute in France that, since Fanny had not obtained the necessary authorization from the French Government, she had never acquired a French domicil, and that con-

¹ See, for example, *Kenrick v. Lawrence* (1890), 25 Q.B.D. 99, 104; see Wilberforce on *Statute Law*, pp. 274-6; Craies on *Statutes*, 3rd ed., pp. 173-7.

² See *Shaw v. Ruddin* (1859), 9 Ir. C.L.R. 214.

³ Sugden, *A Practical Treatise on the New Statutes relating to Property* (1862), pp. 398 et seqq.

⁴ (1857), 10 Moo. P.C. 306, *supra*, p. 563.

sequently her will made in accordance with English law would be regarded as formally valid by a French court. However, it was held that she died intestate, and this caused so much alarm among British subjects resident in Paris that they pressed the legislature to provide a remedy for the future. Stimulated by this agitation Lord Kingsdown introduced his bill to alter the law, but, though not admissible as evidence,¹ it is noteworthy that in his speech to the House of Lords on the second reading he spoke exclusively of Englishmen, Irishmen and Scotsmen, and never once hinted that he wished to legislate for the wills of foreigners.²

The very strong presumption, then, is that it was only for British subjects that the legislature intended to modify the exclusive authority of the *lex domicilii* at death. It could scarcely have intended 'to legislate for the wills of all testators in the world irrespective of their connexion with the United Kingdom'.³ The probable object of the third section was to make it perfectly clear that a will valid under either of the first two sections should not be adversely affected by a later change of domicile. The section merely states more explicitly what had already been stated in the earlier sections. It is submitted that the true meaning is arrived at if the opening words of the third section are read as 'No *such* will'.⁴

Probable
object of
s. 3

Westlake,⁵ however, maintains that the section is of general application, and that a will validly made by a foreigner under the law of his domicile at the time of execution cannot be rendered formally void as a result of his death in a new domicile. This is a most desirable principle which might perhaps be supported by the maxim *ut res magis valeat quam pereat*, but it does not seem to be a justifiable inference from the Act. If it was really intended to alter for all people the English rule of private international law, that the *lex domicilii* at the time of death regulates formalities, it is scarcely credible that more explicit and direct language would not have been used. If clear

Views of
Westlake

¹ *Assam Railway and Trading Co. v. Inland Revenue Commissioners*, [1935] A.C. 445, 458.

² *Hansard*, 162, 860 et seqq.

³ Dicey, p. 626.

⁴ 62 L.Q.R. 175. Morris, *Cases on Private International Law*, pp. 437 et seqq.

⁵ S. 85, pp. 121-2. Wolff, p. 588, agrees with Westlake as also does Graveson, op. cit. (4th ed.), pp. 306 et seqq.; Breslauer, 3 I.L.Q. 343 et seqq. and R. C. Little, 5 I. & C.L.Q. 118 et seqq.; Dicey, pp. 625-8 and Foote, p. 301, disagree. Schmitthoff, op. cit. (3rd ed.), p. 246, prefers the compromise suggested by Dicey in his lifetime, namely, that the section applies to the will of an alien, but only if he dies domiciled in England, Dicey, op. cit. (5th ed.), p. 820.

language was employed in the first two sections to modify the rule for British subjects only, why should a far more sweeping alteration be introduced in such obscure phraseology?¹

In re Groos The only judicial authority invoked by Westlake is a statement by Gorell Barnes J. in the case of *In the Estate of Groos*,² where the facts were as follows:

The testatrix, who was not a British subject, made a will while domiciled in Holland and a week later married a domiciled Dutchman. By Dutch law the will was unaffected by the marriage, but according to English law it was thereby revoked. The parties acquired a domicile in England and after the death of the testatrix her husband moved for a grant of probate.

'Having considered the authorities', said Gorell Barnes J., 'I hold that S. 3 of the Act may reasonably be construed as applicable to a case such as this.' But in what manner did the learned judge classify the 'case'?³ What was the problem according to his view of the facts? He appears to have directed his attention to the effect of the marriage upon the will, for according to one report he said:

'The point for my determination is whether the change of domicile renders the will bad on account of the marriage which took place after the execution of the will.'⁴

These words are slightly different in another report:

'The only point against the admission to probate of the will is that, although the testatrix was domiciled in Holland when she married after making her will, the domicile subsequently became English. Is the effect of this that the will becomes null and void in consequence of the subsequent marriage.'⁵

If this was the issue envisaged by the judge it was not a debatable issue, for whether a will is revoked by a subsequent marriage, as will be seen later, is a matrimonial question that falls to be determined once and for all by the *lex domicilii* of the parties at the time of the marriage.⁶ The rule of Dutch law that marriage does not operate as a revocation was therefore decisive, the validity of the will on that score could not possibly be affected by a later change of domicile and thus Lord Kings-

¹ It is perhaps arguable, however, that since the third section does not apply to British subjects *expressis verbis*, as is the case with the first two sections, the intention must have been that it should have a different effect.

² [1904] P. 269.

⁴ [1904] P. at p. 272.

⁶ *Infra*, pp. 583-5.

³ As to this see 5 *I. & C.L.Q.* 118 et seqq.

⁵ (1904), 73 *L.J.P.* 82, 83.

down's Act was totally irrelevant. Anything said about the extension of the Act to foreigners must be ranked as *obiter*.

We must now consider the question of formal validity in connexion with the testamentary exercise of powers of appointment. A power of appointment exercisable by will is frequently given by an English settlement or an English will to a person who ultimately dies domiciled in a foreign country. In such a case it is essential to ascertain the legal system which determines whether the formalities attending the testamentary exercise of the power are sufficient. The decision reached by English law on this matter may be stated as follows:

Powers of appointment:
What law governs formalities?

The execution by will of a power conferred by an English instrument is valid, if it satisfies the formalities (a) of the law governing the donee's will or (β) of internal English law.

(a) *That system of law by which the will of the donee of the power is tested.*

If an English instrument, whether a settlement or a will, gives to *X* a power of appointing property by will, all that is required to constitute a valid formal exercise is that the will in which the power is exercised shall be one which is recognized as valid by the English principles of private international law.¹ It is not necessary that the will should satisfy the formalities of English internal laws. The wills which are formally valid according to private international law are, as we have seen, those executed in accordance with the law of the testator's domicile at death,² and those executed by British subjects according to one of the legal systems indicated by Lord Kingsdown's Act.³

Any system recognized by English law as governing the will of appointor

'A power to appoint by will simply,' said Lord Romilly, 'may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute [i.e. the Wills Act, 1837].'⁴

¹ *D'Huart v. Harkness* (1865), 34 Beav. 324; *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620.

² For example, see cases cited in previous note.

³ *In re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502, 508-9. The inconsistent decision in *Hummel v. Hummel*, [1898] 1 Ch. 642, may be disregarded, as also the dictum of Kay J. in *In re Kirwan's Trusts* (1883), 25 Ch.D. 373, to the effect that Lord Kingsdown's Act does not apply to powers of appointment at all. In this case the appointment was void in any event, as not having satisfied the formalities prescribed by the donor; see *infra*, pp. 572, 573.

⁴ *D'Huart v. Harkness*, *supra*, at p. 328.

If, for instance, the donee dies domiciled in France, a holograph will executed by him without the attesting signatures of witnesses is a valid exercise of the power.¹ If later he revokes the execution in a manner that is valid by French law, the revocation is effective.² These rules apply both to general and to special powers of appointment.³

The Wills
Act, 1837,
s. 10

Where, as in the above example, the will of the appointor derives its validity from a foreign law it is entirely unaffected by the rule of domestic English law contained in the tenth section of the Wills Act, 1837.⁴ That section consists of two portions, the first prohibitory, the second benevolent.

Firstly, no appointment made by will in exercise of a power shall be valid unless it is made in writing and signed by the testator in the presence of two witnesses who attest the signature.

Secondly, every will executed in the above manner shall, so far as regards the execution and attestation thereof, be a valid execution of the power, notwithstanding that some additional formality or solemnity may have been imposed upon its execution.

The second portion of this section fell to be considered in *Barretto v. Young*,⁵ where:

The power given to the donee was a power to appoint 'by her last will in writing . . . to be executed by her in the presence of, and attested by, two or more credible witnesses'. The donee, who died domiciled in France, left an unattested will which was valid according to French law.

It was held that the will, notwithstanding its conformity with the *lex domicilii*, was not a good execution of the power, since it disregarded the formalities specified by the donor. The benevolent provision of section ten could not be invoked in aid of a will that derived its validity from French law. But an omission of this character may in a proper case be rectified by the court in accordance with the general doctrine that equity possesses jurisdiction to aid the defective execution of a power.⁶ It should

¹ *Barretto v. Young*, [1900] 2 Ch. 339, and cases cited *supra*, p. 571, note 1.

² *Velasco v. Coney*, [1934] P. 143.

³ *In re Wilkinson's Settlement*, [1917] 1 Ch. 620.

⁴ *Barretto v. Young*, [1900] 2 Ch. 339; *In re Kirwan's Trusts* (1883), 25 Ch.D. 373, as explained by Stirling J. in *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442, at p. 452.

⁵ [1900] 2 Ch. 339.
⁶ *In re Walker*, [1908] 1 Ch. 560. The jurisdiction is exercisable in favour of a limited class of persons. In *Barretto v. Young* the appointees did not fall within that class.

be noticed that the will in *Barretto v. Young* would not have been affected by the prohibitory portion of section ten, had the appointor, for instance, been required to sign it in the presence of more than two witnesses.¹

(β) *English law as enacted by the Wills Act, 1837.*

When a testator possessing a power of appointment dies domiciled abroad, it is obviously contrary to principle that the formal validity of his testamentary exercise of the power should be determined by English internal law, since the fundamental doctrine is that his will must observe the formalities of the *lex domicilii*. The courts have held, however, that since the power has been given by an English instrument it is not unreasonable to test the validity of its exercise by English law.² As Lord Romilly said in *D'Huart v. Harkness*:³

Formalities
of English
law suffi-
cient

'The law takes a liberal view, and where the instrument creating the power directs it to be executed by will in a particular form, a will may be good for the purposes of the appointment if executed according to the law of this country, though not according to the law of the domicile.'

A will which thus derives its validity from English internal law is, of course, subject to section ten of the Wills Act. Therefore additional formalities imposed by the donor of the power may be disregarded.⁴

Additional
formalities
may be dis-
regarded

✓(c) *Essential validity.* What Jarman⁵ calls the 'efficacy of testamentary dispositions' is determined by the law of the country in which the testator was domiciled at death.⁶ This rule is not affected by Lord Kingsdown's Act. A will may be admitted to probate under that statute as having complied with the formalities of one of the legal systems specified in the first two sections, but the actual effect of its dispositions must be measured by the *lex domicilii* at death. The grant of probate is conclusive proof that the instrument proved is the will of the testator but it is not conclusive as to the validity of the dispositions. 'You must obtain probate . . . in the country where

Governed
by law of
testator's
last domicile

¹ *In re Price, Tomlin v. Latter, supra*, at p. 452.

² *Tatnall v. Hankey* (1838), 2 Moo. P.C. 342; *In the Goods of Alexander* (1860), 29 L.J.P. & M. 93; *In the Goods of Hallyburton* (1866), L.R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209; *Murphy v. Deichler*, [1909] A.C. 446.

³ (1865), 34 Beav. 324, 328.

⁴ *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

⁵ Jarman on *Wills* (7th ed.), p. 7.

⁶ *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), John. 320; *Macdonald v. Macdonald* (1872), L.R. 14 Eq. 60; *re Groos, Groos v. Groos*, [1915] 1 Ch. 572.

the property exists; and when that is done, you regulate the manner in which you distribute or dispose of it by the law of the country where the testator was domiciled.'¹

'If, for instance, a British subject dies domiciled in France, having made a will in England according to English law, probate is necessarily granted. But if he has neglected to leave to his children that portion of the estate required by French law, the English court allows the will to take effect only as it would do in France. If French law regards the testamentary dispositions as ineffective, the court directs the property to be distributed according to the French law of intestacy.'²

The principle that the law of domicile at death is decisive is well illustrated by the reverse case to that just given. An example is afforded by *Re Groos*, *Groos v. Groos*³ where the facts were as follows:

A Dutch lady made her will in Holland constituting her husband heir of her movable property except for the 'legitimate portion to which her descendants were entitled'. She died domiciled in England, leaving her husband and five children surviving. By Dutch law the 'legitimate portion' of the children was three-fourths of the estate, but by English law it was nothing. It was held that, since the will operated under English law, the whole estate passed to the husband.

Examples
of essential
validity

Whether a beneficiary is entitled to take under a will is determined by the *lex domicilii* of the testator if the question turns upon a rule of substantive law, not upon procedure. In the case of *In re Cohn*:⁴

A testatrix and her daughter, both domiciled in Germany, were killed in an air raid in London in circumstances which left it uncertain which of them died first. The daughter's estate was entitled to movables under her mother's will, but only if she were the survivor. In such a case the English rule is that the younger person is presumed to have survived the elder,⁵ but the presumption by German law is that they died simultaneously.

These presumptions were classified as falling within the sphere of substantive law, and it was held that the German view must be adopted.

Other examples falling under the same principle are whether a gift to an attesting witness, or to the relative of an attesting

¹ *Campbell v. Beaufoy*, *supra*, at p. 326, *per* Page Wood V.-C.

² *Thornton v. Curling*, *supra*; *Campbell v. Beaufoy*, *supra*.

³ [1915] 1 Ch. 572.

⁴ [1945] Ch. 5; 61 L.Q.R. 340.

⁵ Law of Property Act, 1925, s. 184.

witness, is valid;¹ whether a legacy lapses;² what passes under a residuary gift,³ and whether a beneficiary is put to his election.⁴

It should not be assumed that because a testator dies domiciled in England his will is therefore inevitably subject to all the rules of English domestic law concerned with essential validity. This fact has not always been admitted. It has been said, for instance, that whether a restraint upon marriage,⁵ or a gift for masses,⁵ or a gift to a charity is valid, or whether a limitation is void as infringing the rule against perpetuities,⁶ must be determined by the *lex domicilii* of the testator no matter what the domicil of the beneficiary may be. It is submitted that this view is neither consonant with principle nor warranted by the authorities. It entirely ignores the essential difference between the right to give and the right to receive. The two are not necessarily *in pari materia*. The right of a testator to give, as for example whether he is free to bequeath the whole of his property as it pleases him or on the contrary whether he must reserve a legitimate portion for his children, is *ex necessitate* governed by the English *lex successionis* from which his testamentary power of disposition is derived. But there is no reason why this law should restrict the right of a foreign legatee to enjoy a gift in accordance with the terms of the will, provided that the legacy is valid according to his personal law and provided that the limitations imposed upon its enjoyment do not offend some rule of public policy so sacred in English eyes as to demand extra-territorial application.

Not all domestic rules of *lex domicilii* necessarily applicable

Suppose that a testator domiciled in England bequeaths a sum of money to a legatee domiciled in France, and that the legacy, though valid by French law, is void by English internal law as being obnoxious to the perpetuity rule.

Example of the rule against perpetuities

Is the legacy void? The answer must be in the affirmative if the English policy is to insist upon the early vesting of interests regardless of where the property is to be enjoyed and

¹ *In re Priest*, [1944] Ch. 58. This case has been much discussed; see 60 L.Q.R. 114; 61 L.Q.R. 124; 62 L.Q.R. 172-3; 7 M.L.R. 238; Wolff, p. 586.

² *In re Cunningham, Healing v. Webb*, [1924] 1 Ch. 68.

³ Goodrich, p. 516.

⁴ See *In re Ogilvie*, [1918] 1 Ch. 492, 500; Dicey, pp. 833-5; Westlake, s. 125; Halsbury, *Laws of England*, vii. 64; Jarman on *Wills* (7th ed.), p. 511. These authorities do not seem to have been cited to Cohen J. in *In re Allen's Estate*, [1945] 2 All E.R. 264; see *infra*, p. 610, note 1.

⁵ Westlake, p. 154.

⁶ *Ibid.* Dicey agreed with these views, but see now the 7th ed. of his work, pp. 610-11.

administered. Such a suggestion is untenable. The object of the perpetuity rule is to restrict the withdrawal of property from the channels of commerce, a purpose which is clearly local, and which, therefore, cannot justifiably be invoked to destroy a bequest of money that is to be enjoyed and administered in a foreign country. As Lord Cottenham said in an early case:

'The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. . . . The fund [given by the English will] being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had to take place in this country.'¹

This conclusion has several times been reached by the New York Court of Appeals² and on one occasion at least by an Australian court.³ In the laconic words of one judge: 'It is no part of the policy of the State of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California.'⁴ Again:

Example
of a gift to
a charity

Suppose that a testator, domiciled in England, leaves a sum of money in trust that the income thereof shall be used for purposes most conducive to the good of religion in a certain diocese in country *X*, and that persons domiciled in *X* are appointed to administer the trust.

The trust is invalid by English law as not being charitable,⁵ but, if it is valid by the law of *X*, must the court forbid payment of the money to the trustees? Such a ruling would be indefensible. English law confines the definition of a charity within comparatively narrow limits, presumably with the object of restricting the amount of money that may be withdrawn from circulation, but it cannot justifiably claim to impose this policy upon foreign countries. The decisive factor is the law of the country where the trust is to be administered, not the law that governs the instrument of gift. No doubt, three conditions must

¹ *Fordyce v. Bridges* (1848), 2 Ph. 407. An English testator gave the residue of his personal estate to trustees upon trust to convert it into money and lay it out in the purchase of land in England or Scotland according to the limitations of a Scottish entail. Such limitations infringe the English rule against perpetuities. The trustees were allowed to purchase land in Scotland in accordance with the terms of the will.

² Gray, *The Rule against Perpetuities*, para. 263B; Morris and Leach, *The Rule against Perpetuities*, pp. 21-22.

³ *Re Mitchner*, [1922] St. R. Qd. 252.

⁴ *Hope v. Brewer* (1892), 136 N.Y. 126, per O'Brien J.

⁵ *Dunne v. Byrne*, [1912] A.C. 407.

be satisfied before transfer of the money to the foreign country will be authorized.

Firstly, the charitable bequest must be valid according to the law of the country where it is to be administered.

Secondly, there must be persons in that country willing and competent to undertake the task of administration.¹

Thirdly, the purposes for which the bequest is to be employed must not conflict with some rule of English public policy intended to operate extra-territorially. It can scarcely be maintained that a rule which confines within narrow limits the possible beneficiaries of a charitable gift is intended to be anything more than local in its operation. As a New York judge has well said:

Laws defining capable beneficiaries 'are not generally regarded as limitations upon the power of the owner to transfer or transmit the property, but as regulations applicable to the holding of the property in the particular community, founded upon political or social considerations'.²

Such, indeed, is the view that has been taken by the English courts in the few relevant decisions. In three cases between 1784 and 1827 it was held that the Mortmain Act of 1735,³ which provided that a bequest of money to be laid out in the purchase of land for charitable purposes should be void, did not affect a bequest in an English will directing that the money should be expended in another country for these purposes.⁴ There was, therefore, ample authority for Lord Cottenham's statement that:

'A charity legacy void in this country under the statute of Mortmain is good and payable here if for a charity in Scotland.'⁵

It would seem, then, that the principle which refers questions of substantial validity to the *lex domicilii* of the testator is not unqualified.

¹ *New v. Bonaker* (1867), L.R. 4 Eq. 655.

² *Hope v. Brewer* (1892), 136 N.Y. 126, *per O'Brien J.*

³ 9 Geo. 2, c. 36.

⁴ *Oliphant v. Hendrie* (1784), 1 Bro. C.C. 571; *Mackintosh v. Townsend* (1809), 16 Ves. 330; *A.-G. v. Mill* (1827), 3 Russ. 328; affirmed by the House of Lords (1831), 2 Dow. and Clark 393. In this last case the bequest was held void, since it was not clear that the testator contemplated the purchase of land in Scotland, but Lord Lyndhurst said that had such an intention been proved he would have given effect to it; 3 Russ. at p. 338.

⁵ *Fordyce v. Bridges* (1848), 2 Ph. 497, at p. 515. See also the very positive statement of Westlake, *op. cit.*, para. 301.

Essential
validity of
appointed
interests

Special
powers

The proper law to govern the essential validity of a disposition resulting from the exercise of a power of appointment depends upon whether the power is general or special. The effect of the appointment in the case of a special power is determined by the legal system to which the instrument that created the power is subject, for, since the appointor is merely the agent through whom the donor of the power designates the beneficiaries, the latter take under the instrument of creation.

‘But the power in this case is a special power, and the execution of such a power does not bring the appointed property into the will of the appointor at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment. There is therefore no disposition of property belonging to the testatrix.’¹

In the case in which these words were spoken:

A domiciled Frenchwoman, who had a special power of appointment given by an English settlement, was held capable of exercising it in a manner which was incompatible with the French doctrine of community.

General
powers :
two
conflicting
decisions

The Court of Appeal, however, in *In re Pryce*² held that, since the donee of a general power is entitled to dispose of the property as if it were his own, the operation and effect of his appointment must be determined by the law that governs the will by which he exercises the power, i.e. by the law of his last domicile.

In re Pryce

The facts of the case were as follows:

An English lady, who married a Dutchman and became domiciled in Holland, was entitled under the will of her father to a general power of appointment over funds in England. In the circumstances that had occurred, her power of disposition was limited by Dutch law to seven-eighths of her own property, one-eighth being reserved for her mother. By her will, which was subject to Dutch law, she appointed her husband sole heir of such of her property as lay within her power of disposition. According to the expert evidence, Dutch law agreed with English law in this respect, that the bequest made the appointed fund part of the testatrix's own property.

It was held that Dutch law governed the essential validity of the appointment and that therefore the husband was entitled to only seven-eighths of the property.

¹ *Pouey v. Hordern*, [1900] 1 Ch. 492, 494, per Farwell J.

² [1911] 2 Ch. 286. To the same effect, *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391.

This decision seems unexceptionable in principle. Once it was clear that the effect of the bequest was in the eyes of Dutch law to make the appointed fund part of the testatrix's own property, it necessarily followed that any disposition she made of it must be, as regards essential validity, subject to that law. The fund was in this respect no different from property to which she was absolutely entitled in her own right.

The most recent case on the subject is *In re Waite's Settlement Trusts*,¹ where the facts were somewhat similar to those in *In re Pryce*.

A deed, executed in 1924 and subject to English law, limited certain trust funds to the testatrix for life and after her death in trust as she should appoint, with an ultimate trust in favour of her daughter G absolutely in default of appointment. By her will, after leaving certain legacies, she bequeathed her residuary estate to E absolutely. She was domiciled in Guernsey both in 1924 and at the time of her death.

By the law of Guernsey, she could dispose of only one-half of her property, the other half passing to her son and daughter equally. The expert witness was of opinion that by Guernsey law the trust fund would not be regarded as forming part of the testatrix's property, that the residuary bequest was not an effective exercise of the power and that therefore the fund did not pass to E.

If, therefore, Guernsey law were the proper law to determine whether there had been an effective appointment, it would seem to follow that the trust fund would go as in default of appointment under the deed of 1924. Danckwerts J., however, took the view that, since the power had been created by the English deed of 1924, the effect of the residuary bequest fell to be measured by English law. In his opinion, the question was one of construction. Did the words in the will show an intention to exercise the power? Having regard to section 27 of the Wills Act, 1837, he felt that the question must be answered in the affirmative. This reference to section 27 is a curious but common phenomenon of judicial utterances upon the proper law to govern the essential validity of a testamentary appointment made by a testator domiciled abroad.² The section lays down a

¹ [1958] Ch. 100. Discussed 34 *B.X.B.I.L.* 408-11 (P. B. Carter): 73 *L.Q.R.* 459-62 (J. H. C. Morris); Dicey, pp. 641-4. For the views of Harman J. on the decision, see *In re McMorran*, [1958] Ch. 624, 633-4.

² See, for example, *In re D'Este's Settlement Trusts*, [1903] 1 Ch. 898; *In re Scholefield*, [1905] 2 Ch. 408; *In re Simpson*, [1916] 1 Ch. 502; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620; *In re Pryce* [1911] 2 Ch. 286, and *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391, at pp. 396-8, where the cases are summarized by Peterson J.

rule of construction to the effect that, unless a contrary intention appears by the will, a general bequest of personalty is to be construed as including personalty which the testator has power to appoint in any manner he may think proper. One effect of this enactment is that a residuary bequest operates as an execution of a general power.¹ But it is difficult to appreciate the relevance of the section in the case of a will governed by a foreign law. Whether a bequest is essentially valid in whole or in part, as for example whether its subject-matter can be retained *in toto* by the nominated legatee, is necessarily a matter for the *lex successionis*, which will scarcely be influenced by some English rule of construction. Either an English or a foreign court might, indeed, conclude that the appointor, in the light of his English background and in the light of section 27, clearly intended to pass the appointed fund to the legatee, but that would not carry the matter much further. His intention, however clear, would not enable him to make a disposition forbidden by the *lex successionis*.² It is respectfully submitted, therefore, that the decision of Danckwerts J. is difficult to justify in principle.

The province of construction

✓(d) *Construction*. The province of construction is to ascertain the expressed intentions of the testator, i.e. the meaning which the words of the will, when properly interpreted, convey.³ If the intention is expressed in a manner which leaves no room for possible conjecture, the aid of private international law is unnecessary, for the duty of any court, no matter in what country it may sit, is to give effect to expressed intentions, and, these being clear, there can be no occasion to test the language of the will by reference to any particular legal system. If, however, the language of the will leaves the intention doubtful, or if it uses expressions which are ambiguous or equivocal, a problem of choice of law arises, for it is essential that the doubtful intention of the testator should be ascertained by reference to rules of construction obtaining in one particular system of law. The consequences may be serious according as this law or that law is chosen, for when it is said that the intention of the testator is the sovereign guide in questions of construction, this does not mean that his language is necessarily to be construed in a manner which would commend itself to an intelligent man, but that

¹ *In re Spooner's Trusts* (1851), 2 Sim. (N.S.) 129.

² *Philippson-Stow v. Inland Revenue Comrs.*, [1960] 3 W.L.R. 1008 per Lord Reid at p. 1019.

³ Hawkins on *Wills*, p. 1.

it must be read in the light of those technical rules of construction recognized by the governing legal system. The following description which Jarman gives of the view of English law on the matter is apposite:

'Though the intention of testators, when ascertained, is implicitly obeyed, however informal the language in which it may have been conveyed; yet the courts, in construing that language, resort to certain established rules, by which particular words and expressions, standing unexplained, have obtained a definite meaning; which meaning, it must be confessed, does not always quadrate with their popular acceptance. This results from the intendment of law, which presumes every person to be acquainted with its rules of interpretation, and consequently to use expressions in their legal sense, i.e. in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances.'¹

It will be seen, therefore, that in choosing a law to govern construction the desideratum is to discover that system with which the testator was most intimately acquainted, and which it is just to presume that he had in mind when drafting his testamentary dispositions. As was said in one case: 'The English court must find the true meaning of the [testamentary] appointor from the words he has used in the frame in which he has used them.'² Certain expressions, such as 'next of kin', bear different meanings in different countries, and it is obvious that the intention of a testator may be defeated unless the legal system with reference to which he wrote his will is correctly ascertained.

The law with which the ordinary person is most familiar is the law of his existing domicile, and, despite the fact that certain authorities choose the last domicile as the controlling factor,³ it is more consonant with the desire of the court to implement the intention of the testator to say that the law of the domicile at the time when his will is made governs its construction, unless there is evidence indicating that his mind was directed to some other legal system. 'If', said Lord Dunning, 'a question arises as to the interpretation of the will and it should appear that the testator has changed his domicile between making his will and his death, his will may fall to be *construed* according to the law of his domicile at the time he made it: though in all other

Legal system intended by testator should govern construction

Prima facie law of testator's existing domicile governs construction

¹ Jarman on *Wills* (1st ed.), ii. 737.

² *In re McMorran*, [1958] Ch. 624, 634, per Harman J.

³ *In re Cunningham*, [1924] 1 Ch. 68; *Trotter v. Trotter* (1828), 4 Bli. (N.S.) 502; *Yates v. Thompson* (1835), 3 Cl. & Fin. 544.

respects it would be governed by the law of his domicile at the date of his death.¹

Examples In most cases, of course, the domicile does not change after the will has been made and the Reports freely illustrate the application of the *lex domicilii* at death. Where, for instance, a domiciled Englishman bequeathed a legacy to the 'next of kin' of a foreigner, it was held that the legatees must be ascertained according to English law.² Whether a gift in the will of a domiciled Englishman was a satisfaction of a debt due under a Scottish settlement was tested by reference to English law.³ Words of value or of quantity or of measurement, which vary in meaning in different countries, are interpreted according to the *lex domicilii* of the testator.⁴ If, for example, a testator domiciled in Queensland bequeaths £1,000 to a domiciled Englishman, the legatee will receive as many English pounds as are obtainable for £A1,000.

Meaning of 'next of kin'

Satisfaction

Above rule yields to contrary intention

There is, however, no absolute rule that the interpretation of a will depends upon the law of the testator's domicile. It is merely a *prima facie* rule which is displaced if the testator has manifestly contemplated and intended that his will should be construed according to some other system of law.⁵ Thus where a domiciled Frenchwoman left an unattested will valid by the law of France, in which she said that the will was to 'be considered in England the same as in France', Stirling J. held, upon the question whether the document operated as the execution of a power, that the testatrix wrote with reference to English law.⁵

Effect of Lord Kingsdown's Act on construction

Westlake has suggested that since Lord Kingsdown's Act a will must always be construed according to the law of the testator's domicile at the time of making the will, not according to the law of his last domicile.⁶ Lord Lyndhurst, however, in his speech on the third reading of the bill, said:

'It relates merely to the form of the instrument, and the manner in which it ought to be executed. It has nothing whatever to do with the construction of a will after it has been submitted to probate.'⁷

¹ *Philpston-Stow v. Inland Revenue Comrs.*, [1960] 3 W.L.R. 1008, at p. 1030.

² *In re Fergusson's Will*, [1902] 1 Ch. 483. But see *In re Goodman's Trusts* (1881), 17 Ch.D. 266; *supra*, p. 428.

³ *Campbell v. Campbell* (1866), L.R. 1 Eq. 383.

⁴ *Pierson v. Garnet* (1786), 2 Bro. Ch. 38; Story, s. 479 (b); Westlake, s. 123.

⁵ *In re Price, Tomlin v. Latter*, [1900] 1 Ch. 442.

⁶ Westlake, p. 155.

⁷ *Hansard*, vol. 162, p. 1641.

Notwithstanding these words, it is possible within limits to subscribe to Westlake's view. In fact it would seem that the learned author, while going too far in applying his suggestion to all testators, whether British subjects or not, is unduly cautious in limiting it to the law of the domicile. It is submitted that, in view of the desire of English courts to discover a testator's real intention, the following proposition is justified:

If the will of a British subject is admitted to probate because it has been executed according to one of the legal systems prescribed by Lord Kingsdown's Act, the presumption, in the absence of evidence to the contrary, is that the testator intended it to be construed according to the legal system from which it derived its formal validity.

(e) Revocation. It is convenient to deal with this matter under two heads according as the alleged cause of revocation is the subsequent marriage of the testator or some other act done by him. Revocation

(1) Revocation by subsequent marriage. The rule, for instance, of English law is that a will is revoked by marriage unless it is explicitly expressed to be made in contemplation of marriage.¹ Few other legal systems have adopted the rule. When, therefore, a person marries after making a will and then dies after acquiring a new domicile, the question may arise whether the *lex domicilii* at the time of marriage or the *lex domicilii* at the time of death determines the effect of marriage on the will. Revocation by marriage

The answer to this question depends upon whether the rule as to revocation by marriage is to be classified as a rule of matrimonial law or of testamentary law. If it is a rule concerning husband and wife, then its effect must be tested by the law of the matrimonial domicile, i.e. in most cases by the *lex domicilii* of the husband at the time of marriage; if, on the other hand, it has nothing to do with the matrimonial régime at all,² its effect is measured by the *lex domicilii* at the time of the testator's death. It would seem scarcely open to doubt that it is essentially a doctrine connected with the relationship of marriage, and that this is so was affirmed by Vaughan Williams L.J. in the case of *In re Martin, Loustalan v. Loustalan*.³ This rule of revocation part of matrimonial law

If we disregard Lord Kingsdown's Act for the moment, a concrete example will show the effect of a change of domicile. Therefore tested by law of matrimonial domicile

A makes a will while domiciled in England; then acquires a domicile

¹ Wills Act, 1837, s. 18; Law of Property Act, 1925, s. 177.

² As Sir F. H. Jeune thought; *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, 223.

³ [1900] P. 211, 240; *supra*, p. 50.

in Scotland (where marriage does not revoke a will); then marries in Scotland, and ultimately dies domiciled in England.

In this case the will stands. English law applies only as being the governing testamentary law under which *A* dies, and therefore its doctrine as to the effect of marriage cannot affect a marriage that took place when the parties had a foreign domicile. The reverse case to that just put is as follows:

A makes a will while domiciled in Scotland; then acquires an English domicile and later marries in England.

Here the question as to revocation is governed by English law as being the law applicable to all matters concerning the matrimonial régime.

The remaining question is whether the law as above stated is affected by section 3 of Lord Kingsdown's Act, which provides that no will shall be revoked by a subsequent change of domicile.¹ It is difficult to appreciate what effect the statute can have on the matter. Westlake, however, writes as follows:

'If the testator marries after changing his domicile, and the marriage would revoke his will by the law of his last domicile, but not by that under which he was domiciled at the time when he made his will, the will is not revoked.'²

The words 'last domicile' are obscure, but what he appears to maintain is, for instance, that if a Frenchman makes a will while domiciled in Scotland and then, having acquired an English domicile, marries in England, the will is saved from revocation by the operation of the third section.

This would appear to be an erroneous view. Even if a British subject were to make a will while domiciled, for instance, in Scotland, and were then to marry in England after acquiring an English domicile, it is reasonably clear that the will would not be saved from revocation by the third section. For one thing, the operation of a matrimonial rule can scarcely be affected by a testamentary statute.³ For another, section 3, since it refers to a mere change of domicile, cannot reasonably be extended to a case where in addition there is some further act, such as an express revocation, or an implied revocation by marriage.

Two decisions are said to justify Westlake's statement.

In the case of *In the Goods of Reid*,⁴ a British subject while domiciled in Scotland made a settlement in Scotland, which was a valid will by

*In the
Goods
of Reid*

¹ *Supra*, p. 567.

² S. 86.

³ Dicey, pp. 625-8.

⁴ (1866), L.R. 1 P. & D. 74.

Scottish law though not by English law. He then married, being still domiciled in Scotland. He died domiciled in England. Held—that the will was not revoked by the change of domicil.

Once it was admitted that a rule of this nature falls within the sphere of matrimonial law, it could scarcely be contended that the marriage effected a revocation, for the only law which was entitled to speak, i.e. the matrimonial law of Scotland, denied such a result.

The second case—*In the Estate of Groos*¹—has already been discussed,² and all that need be recalled is that in the circumstances section 3 was entirely irrelevant, since it fell to Dutch law alone to determine the effect of the marriage upon the will. A later change of domicil could not affect the position. The view expressed in the judgment, therefore, that the case fell within the general terms of the section, was superfluous.

The submission, then, is that the rule relating to revocation of a will by marriage, since it falls within the sphere of matrimonial law, cannot be affected by any law, statutory or otherwise, the province of which is to regulate testamentary succession.³

(ii) Revocation by some act other than marriage. What the law is that governs this matter is practically destitute of authority.⁴ Is it the *lex domicilii* of the testator at the time of revocation or at the time of his death? The matter ceases to be academic if his domicil is not the same at the two moments, for what is an effective revocation by one law is frequently ineffective by another.

Most writers favour the *lex domicilii* at death,⁵ but it is difficult to agree that this represents the sound principle. It seems to be based upon the strange theory that a mere change of domicil can have a retroactive effect upon a completed transaction. The testator intends to revoke his will. He carries out his intention by the performance of the act which is regarded as essential and effective by the law to which he is at the moment subject. The mind recoils from the suggestion that the effect of this act within the law may be nullified or changed if, at some later period in his life, he happens to become subject to a different personal law. It requires something more than this to undo what has been lawfully and intentionally done in the past.

¹ [1904] P. 269.

² *Supra*, p. 570.

³ But see 3 *I.L.Q.* 348–50.

⁴ For a full discussion of revocation see Johnson, *The Conflict of Laws*, pp. 102–14; Theobald on *Wills* (11th ed.), pp. 5–7; Dicey, pp. 835 et seqq.

⁵ Beale, s. 307. 1; Goodrich, p. 519; Wolff, s. 569. *Contra*, Dicey, p. 835; Stumberg, p. 394; Johnson, op. cit.

The *lex domicilii* at death can scarcely be the sole law entitled to govern the matter.

It would seem that the governing law must be considered in the light of the method of revocation. A will is revocable either by a later will or by some other act such as the destruction of the original document.

Express
revocation
by will

A testamentary revocation is obviously effective, if it is express and if it is contained in a will that is formally valid according to the proper law that governs the form of testamentary execution.¹

In other words, it is effective if it complies with the forms required by the *lex domicilii* of the testator at the time of his death, or, in the case of a British subject, with those required by any one of the alternative systems of law permitted by Lord Kingsdown's Act.

But it does not necessarily follow that a revocation is ineffective merely because it is ineffective by the law that governs the form of testamentary execution. Suppose that:

A testator, not a British subject, makes a will valid according to English law while he is domiciled in England. He then acquires a domicile in Quebec and makes a holograph will there, revoking all former wills. He later dies domiciled in England.

If the decisive date in these circumstances is the date of death, then the first will must stand, for the holograph will, though valid by Quebec law, is invalid by the *lex domicilii* at death. Nevertheless, for the general reasons given above, it is submitted that the revocation should be regarded as effective, on the ground that it complied with the *lex domicilii* of the testator at the time of its completion. That a solemn and deliberate act by the testator, performed according to the only law applicable to him at the time, should be cancelled by a mere change of domicile, and that in consequence his fortune should be distributed in a manner probably destructive of his wishes and expectations, seems to be required neither by reason nor by principle.

Revocation
by destruction

That the time of revocation is the decisive date seems even more apparent in the case of revocation by the destruction of a will. The difference between the internal systems of England and Quebec provides an illustration of the matter. By English law a will is revoked if it is destroyed by a third person in accordance with the intention, and in the presence, of the

¹ *Cottrell v. Cottrell* (1872), 2 P. & D. 397.

testator. Quebec law regards the revocation as effective even though the testator is not present at its destruction. If therefore a will is destroyed by an agent in pursuance of instructions given to him by a testator domiciled in Quebec, it would be perverse to contend that, should its contents be ascertainable, it would be revived were the testator to die domiciled in England.

CHAPTER XVI

THE LAW OF IMMOVABLES

- I. In general immovables are governed by the *lex situs*. Pages 588-614.
 1. Jurisdiction. Pages 590-6.
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 3. Formalities of alienation. Pages 597-601.
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 5. Succession. Pages 603-14.
- II. The effect of equitable jurisdiction *in personam* on foreign immovables. Pages 614-24.

I. IN GENERAL IMMOVABLES ARE GOVERNED BY THE *LEX SITUS*

Universal
application
of *lex situs*

IN the United States of America and in European countries with few exceptions,¹ the general rule is that the *lex situs* is the governing law for all questions that arise with regard to immovable property:²

'The consent of the tribunals,' says Story,³ 'acting under the common law, both in England and America, is in a practical sense absolutely uniform on the same subject. All the authorities in both countries, so far as they go, recognize the principle in its fullest import, that real estate or immovable property, is exclusively subject to the laws of the government within whose territory it is situate.'

The rule was authoritatively stated for English law in *Nelson v. Bridport*,⁴ where Lord Nelson, in his capacity as Duke of Bronte, had attempted to devise his Sicilian estate in a manner contrary to the law of Sicily. Lord Langdale M.R. said:⁵

'The incidents to real estate, the right of alienating or limiting it, and the course of succession to it, depend entirely on the law of the country where the estate is situated. Lord Nelson having accepted the Sicilian estate could deal with it only as the Sicilian law allowed; he had a right to appoint a successor, but no right to modify the estate, interest, or powers of disposition to which the successor was entitled by the law

¹ Exceptions are Italy (see *In re Ross*, [1930] 1 Ch. 377, *supra*, p. 78), Spain, Sweden, Finland, Czechoslovakia and Germany, where succession to immovables is governed by the *lex patriae* of the deceased owner.

² This proposition is so clear as scarcely to require authorities, but see *Birt-whistle v. Vardill* (1839), 7 Cl. & F. 895; *Coppin v. Coppin* (1725), 2 P. Wms. 291; *In re Duke of Wellington*, [1947] Ch. 506; [1948] Ch. 118; Dicey, Rule 85, p. 512; Westlake, s. 156; Foote, p. 223; Story, ch. x; it is equally recognized in India, *Bonnaud v. Charriol* (1905), 1 L.R. 32 Calc. 631.

³ S. 428.

⁴ (1845), 8 Beav. 547.

⁵ At p. 570.

of Sicily. The successor became the holder of the estate subject to the incidents annexed to it by the grant and the law of Sicily and no others. Amongst the incidents was a particular course of succession different from that which Lord Nelson had directed, and the necessary consequence appears to be that no operation or effect could be given to the expressed wish and intention as to the succession to the estate itself, beyond that which the law of Sicily allowed.'

Before giving specific illustrations of the doctrine in operation it is essential that the true meaning of the expression *lex situs* should be understood. Most decisions and most writers have proceeded upon the assumption that it means the relevant rule applicable at the *situs* to a purely domestic situation involving no foreign element at all. The assumption, however, is scarcely warranted. This, as we have seen in considering the *renvoi* doctrine, is one of those exceptional cases in which the court of the forum refers to the whole law of the foreign *situs*.¹ It may be that a court at the *situs*, if required to give a decision, would apply the relevant rule of its own law applicable to a purely domestic situation. This, however, is not necessarily so. The relevant rule should be examined in the light of its reason, the purpose which it is designed to effect and the policy upon which it is based, in order to ascertain whether it is properly applicable to a case containing a foreign element. It does not follow that a rule of the land law designed to promote the welfare of persons domiciled in the country or to regulate local transactions should necessarily be extended to transactions completed abroad between domiciled foreigners. The truth of this is well brought out by Cook in his discussion of the New Hampshire case of *Proctor v. Frost*,² where the facts were these:

By the statutory law of New Hampshire a wife is incapable of becoming surety for her husband, but by the law of Massachusetts she is free from this incapacity. A married woman entered into a transaction in Massachusetts, where she was domiciled, by which she became surety for her husband. By way of security she executed in that State a mortgage of her land in New Hampshire.

There was no dispute that her capacity to execute the mortgage as a surety fell to be determined by the *lex situs*, but that did not inevitably mean that the New Hampshire statute applied to the instant case. A correct decision on that question could

¹ *In re Schneider's Estate* (1950), 96 N.Y.S. 652; Cheatham, p. 67; *supra*, p. 84.

² [1938] 89 N.H. 304; Cheatham, *Cases on Conflict of Laws*, p. 574; Cook, *Logical and Legal Bases of Conflict of Laws*, p. 274.

scarcely be reached without first considering the purpose of the statute. Was this purpose to regulate the conveyance of New Hampshire land, or was it to protect wives against the importunities of embarrassed husbands? If it was the latter, it would be unseemly and inexpedient to extend this paternal solicitude to wives domiciled in foreign jurisdictions. In the result the Supreme Court of New Hampshire considered that the object of the statute was to protect married women within the jurisdiction, and they therefore held the mortgage to be valid. This decision stands out as one of the few in which the matter has been approached in this manner. It will be found, almost without exception, that the term *lex situs* is interpreted in its narrow literal sense as meaning that rule which applies to an analogous situation free from all trace of foreign elements. This narrow meaning must, of course, be adopted when the dispute concerns the legal effects of a conveyance, as, for example, when the question is whether there has been an infringement of the rule against perpetuities or whether the interest created is legally possible,¹ but there is no reason why it should be regarded as the only possible meaning. *Chiwell v. Carlyon*² is one of the few cases in which a more liberal construction was put upon the term *lex situs*. In exceptional cases there may be a local statute which delimits the sphere of operation of some rule of the *lex situs*. An instance of this is the Inheritance (Family Provision) Act, 1938,³ which empowers the Chancery Division to order that reasonable maintenance for dependants shall be made out of the estate left by the deceased. The Act is expressly limited to persons who die domiciled in England. Therefore, the result of this 'choice of law' clause is that if, for example, a testator dies domiciled in Scotland, the court has no jurisdiction to order maintenance out of land that he leaves in England.⁴

Modifica-
tion of the
general
principle
in equity

The doctrine that the *lex situs* governs immovables is subject to modification in certain cases where an action concerning a right of property is affected by some personal element arising from contract, tort, breach of trust and similar phenomena, but before dealing with these⁵ it is necessary to examine rather more closely particular applications of the overriding principle.

1. *Jurisdiction.*

Court of
situs alone
competent

An English Court has no jurisdiction to adjudicate upon the right of property in, or the right to possession of, foreign im-

¹ Cook, op. cit., p. 270.

² *Supra*, pp. 538-9.

³ 1 & 2 Geo. VI, c. 45.

⁴ 62 L.Q.R. 178-9.

⁵ See *infra*, pp. 614 et seqq.

movables, even though the parties may be resident or domiciled in England.¹ This rule is generally based upon the practical consideration that only the courts of the *situs* can make an effective decree with regard to land.

'In respect to immovable property,' said Meili,² 'every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*.'

It was at one time thought, however, that as regards this country the rule was not based on substantial grounds, but was due to the technicalities of the English law of procedure. In early days juries were chosen from persons acquainted with the parties and with the merits of a case, and it was one of the strictest rules of procedure that litigants should lay the *venue* with exactness, i.e. should state with the utmost certainty the place where the facts giving rise to the dispute had arisen. The *venue*, or the place from which the jury was summoned, had to be the place where the cause of action arose. This meant, of course, that it was impossible to entertain an action in England which related to foreign land. A distinction, however, was later made between local and transitory actions. If a cause of action was one that might have arisen anywhere, it was *transitory*; if it was one that could have arisen only in one place, it was *local*. In local matters, such as claims to the ownership of land, the *venue* had still to be laid with accuracy, but in transitory matters the plaintiff was allowed to lay the venue where he pleased. Local *venues* were abolished by the Judicature Act and by the Rules made thereunder, and the rule now is that 'in every action in every Division the place of trial shall be fixed by the court or judge'.³ This abolition of local actions removed the technical objection to the possibility of bringing an action in respect of foreign immovables before an English court, and it was not long before it was suggested, and indeed decided, that such actions could now be entertained. This argument was strongly pressed in *British South Africa Company v. Companhia de Moçambique*.⁴ 1813.

Absence of jurisdiction formerly based upon doctrine of *venue*

This was an action of trespass brought against the defendants for

¹ *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602; *Deschamps v. Miller*, [1908] 1 Ch. 856, *per Parker J.*

² *International Civil and Commercial Law*, Eng. tr. (1905), p. 279.

³ R.S.C., O. xxxvi, R. 1. For the history and a full account of the subject see the notes to *Mostyn v. Fabrigas* in Smith's *Leading Cases* (12th ed.), i. 615-19.

⁴ [1893] A.C. 602.

having broken into and taken possession of large tracts of lands and mines in South Africa.

The Court of Appeal held that, local *venues* having been abolished, such an action could properly be brought here.¹ The House of Lords, however, reversed this decision and held that an English court has no jurisdiction to entertain a suit with respect to foreign immovables, and, moreover, it finally dispelled the idea that this principle ever rested upon a technical rule of procedure.

'My Lords,' said Lord Herschell in his speech, 'I have come to the conclusion that the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to land situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Act have not conferred a jurisdiction which did not exist before.'

Jurisdiction excluded in two cases

Stated more explicitly, what this decision signifies is that the jurisdiction of the court is barred only where the action raises one or other of two issues, namely,

first, the title to, or right to possession of, land abroad;

secondly, the recovery of damages for trespass to such land.²

(1) Action founded on a disputed claim of title

The exclusion of jurisdiction in the first type of action is fully justified, for what is at stake is a disputed claim of title and any judgment *in rem* that might be given would be totally ineffective unless it were accepted and implemented by the authorities in the situs. Examples of a refusal of jurisdiction on this ground are:

a suit for the partition of land in Ireland;³

an action to test the validity of a devise of land situated in Pennsylvania;⁴

an action⁵ or a petition of right⁶ to recover possession of Colonial land;

a suit to obtain inspection of documents, possessed by the defendant in England, in aid of an action for the recovery of land which was pending in India.⁷

On the other hand, there is no objection to an action for the

¹ [1892] 2 Q.B. 358.

² *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1936] 1 K.B. 382, at p. 396, *per* Scott L.J.

³ *Cartwright v. Pettus* (1676), 2 Cas. in Ch. 214.

⁴ *Pike v. Hoare* (1763), Amb. 428.

⁵ *Roberdeau v. Rous* (1738), 1 Atk. 543.

⁶ *In re Holmes* (1861), 2 J. and H. 527.

⁷ *Reiner v. Marquis of Salisbury* (1876), L.R. 2 Ch.D. 378.

recovery in England of a rent service issuing out of foreign land, for such an action by a lessor against his lessee is personal and is in no sense founded on a disputed claim of title to the land.¹

A question that has arisen at least once is whether an action to recover arrears of rent charged on land abroad is maintainable in England. In *Whitaker v. Forbes*:²

Is a rent-charge recoverable?

An English testator devised land in Australia to the defendant, but charged it with the payment of an annuity of £500 to the plaintiff.

An action to recover arrears of this rentcharge inevitably failed, for it had been commenced before the abolition of the rules of *venue* by the Judicature Act and thus the court had no option but to enforce the technical rule that the action was local and therefore not maintainable. Lord Cairns, however, remarked that it might possibly be maintainable in the future.³ In this particular case, of course, the defendant, having assumed no contractual obligation, was liable solely on the ground of privity of estate arising from his possession of the land, and there can be no doubt that a liability which rests upon privity of contract, as where a borrower charges his land with the repayment of the loan, will be enforceable in English proceedings.

There are two exceptions to the principle that a possessory or proprietary title to foreign land is not justiciable in England. Two exceptions

(a) If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the court, in the exercise of its jurisdiction *in personam*, will not shrink from ordering him to convey or otherwise deal with foreign land. This doctrine, which was established in *Penn v. Baltimore*, is discussed in more detail below.⁴ (a) Action founded on a personal obligation

(b) The second exception, which lacks direct authority but which undoubtedly exists in practice, is apparent from such well-known cases as *In re Duke of Wellington*⁵ and *Nelson v. Bridport*,⁶ to take only two examples.⁷ In each of these cases jurisdiction was assumed although quite clearly the title to foreign land was the matter in dispute. Since parties cannot (b) Question affecting foreign land arising incidentally in English action

¹ *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1936] 1 K.B. 382.

² (1875), L.R. 1 C.P.D. 51.

³ *Ibid.*, at p. 52.

⁴ *Infra*, pp. 614-24.

⁵ *Supra*, p. 82.

⁶ *Supra*, p. 588.

⁷ See also, *In re Piercy*, [1895] 1 Ch. 83; *In re Hoyles*, [1911] 1 Ch. 179; *In re Ross*, [1930] 1 Ch. 377, *supra*, p. 78.

consent to the exercise of a jurisdiction which the court admittedly does not possess,¹ how is this divergence from the general principle to be explained? The usual explanation is that if an estate or a trust, which includes English property and foreign immovables, is being administered in English proceedings, the court is prepared to determine a disputed title to the foreign immovables.² Perhaps it was this practice that Lord Herschell had in mind when he said:

'It is quite true that in the exercise of the undoubted jurisdiction of the courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands.'³

Although a stern critic might detect a certain inconsistency in the statement and might even question whether the title to the Spanish land in the *Wellington Case* was a mere incident in the proceedings, there is no doubt that in the course of dealing with such a matter as a trust or a will subject to English law the courts have in fact not hesitated to determine the title to foreign land. The jurisdictional difficulty that arises appears to have been canvassed only once,⁴ and all that can be said is that the practice comes perilously near to destroying the supposedly universal principle that jurisdiction concerning the title to, or possession of, immovables, resides only in the *forum rei sitae*.

¹ Duncan and Dykes, *Principles of Civil Jurisdiction*, p. 258; see also the doubt expressed by Somervell L.J. in *The Tolten*, [1946] P. 135, at p. 166.

² 64 L.Q.R. 268 (J. H. C. Morris); Graveson, *op. cit.*, p. 363. Dr. Morris suggests that the English and foreign property must be subject to similar limitations, *sed quaere*.

³ *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, 626. See also the remark of Westlake, *op. cit.*, para. 173, where he says that the English court may perhaps assume to determine the right to the property or possession of foreign immovables 'on the ground of movable property being mixed up in the same proceedings'.

⁴ *In re Duke of Wellington*, [1948] Ch. 118, 120, where in the course of argument before the Court of Appeal the court raised the question of jurisdiction in regard to the Spanish will. 'The matter was argued at some length, but it was ultimately arranged that the court would deal with the matter on the footing that the law of England applied, the parties expressing their willingness to be bound by the decision.' It is perhaps regrettable that this arrangement has been reported, for it gives the impression that if the parties consent the court can arrogate a jurisdiction that it does not possess. It must be admitted, however, that this was done in *The Mary Moxham* (1876), 1 P.D. 107.

The second type of proceeding that falls under the ban imposed by the *Moçambique rule* is an action to recover damages for a trespass to foreign land or for loss caused by such acts as waste or injurious flooding. This ban has little to commend it and in some countries it has been repudiated.¹ Probably the sound distinction is that made by Lord Mansfield—between actions *in rem* where the judgment cannot be effective unless the subject-matter lies within the control of the court, and actions against the person in which only damages are claimed.² An action for injury to land, whether trespass or case, falls within the latter class.

(2) Action
of trespass

An exception to the rule that the English court takes no cognizance of a trespass to foreign land was, however, recognized by the Court of Appeal in *The Tolten*,³ where an Admiralty action *in rem* was successfully brought against the owners of a ship to recover damages for injury caused by negligent navigation to a pier at Lagos. The court held that the procedural ban clearly and finally imposed by the *Moçambique rule* in the case of an action at common law does not apply to a case where the High Court exercises its admiralty jurisdiction.

Admiralty
Court has
jurisdiction
in trespass

Scott L.J. was at pains to demonstrate that the *Moçambique rule* is incompatible both with the exercise of admiralty jurisdiction and with the general law of the sea. He rested his decision upon two main reasons.

Decision of
Court of
Appeal in
The Tolten

First, he said it would be inconsistent to exclude a jurisdiction, which admittedly embraces the high seas below bridges in any part of the world, merely because the damage complained of is a trespass to foreign land.

Secondly, he emphasized how important it is that the essential nature of the maritime lien, as recognized by the nations which apply the general law of the sea, should not be repudiated by English courts. The universal law is that a person injured by a negligent ship acquires a lien which adheres to the ship until discharged, and which is available to the creditor against even a purchaser for value. To subject this vested right to a restriction peculiar to the common law of England would be to create an unwarranted divergence from

¹ For example, New York, Minnesota and Arkansas, see 66 *Univ. of Pennsylvania Law Review*, 301; *ibid.*, vol. 73, p. 19; 6 *Vanderbilt Law Review*, 786.

² *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 180-1. This view was later rejected, *Doulson v. Matthews* (1792), 4 T.R. 503, where the technical rule that an action *quare clausum fregit* was local was rigidly applied. On the subject generally see Hancock, *Torts in the Conflict of Laws*, pp. 95 et seqq.

³ [1946] 1 All E.R. 79; affirmed, [1946] P. 135.

the general law. To subject it to the *Moçambique rule* would not only constitute a serious invasion of the creditor's right but might well produce a ridiculous situation.

'Suppose,' says the learned Lord Justice, 'ship *A* by one and the same act of negligent navigation at Lagos to have caused injury to (1) the plaintiff's wharf, (2) merchandise on the wharf, (3) people on the wharf, (4) ship *B* lying near the wharf. On these assumed facts, the injured parties numbers 2, 3 and 4 can conduct a suit *in rem* in the admiralty court, but if the *Moçambique rule* is applied, number 1 is barred.'¹

2. *Capacity to take and transfer immovables.*

Capacity
to take
land

Unless a person has capacity by the *lex situs* to take immovables, he will be excluded from ownership.

'Thus if the laws of a country exclude aliens from holding lands, either by succession or by purchase or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of their domicil.'²

In *Duncan v. Lawson*,³ for instance, it was admitted that a bequest by a domiciled Scotsman of English leaseholds to trustees upon trust for sale and out of the proceeds to pay certain legacies to charities was void as infringing the Mortmain and Charitable Uses Act, for whether a charity was competent to take English freeholds and leaseholds, even under a foreign will, must depend upon English law.

Capacity to
transfer
land

The same is true of capacity to transfer immovables, whether by sale, gift, mortgage or devise.⁴ If full age is attained in country *A* at 21 and in country *B* at 25, a person 22 years old, domiciled in *A*, cannot execute a valid conveyance of lands lying in *B*; whereas a person of the same age, even though domiciled in *B*, can effectually convey land in *A*.⁵

Lex situs
governs

It was definitely established by *Bank of Africa Ltd. v. Cohen*⁶ that this rule is part of English law, though it would seem that the case raised a question of form rather than of capacity. The facts were these:

The defendant, a married woman domiciled in England, entered into a deed in England by which she agreed to make a mortgage of her land at Johannesburg in favour of the plaintiffs. The mortgage was intended to secure money lent to her husband. The Roman-Dutch law

¹ *The Tolten*, [1946] P. 135, 146-7.

² Story, s. 430.

³ (1889), 41 Ch.D. 394.

⁴ Story, s. 431.

⁵ Cp. *Sell v. Miller* (1860), 11 Ohio State 331; Beale, ii. 25; Lorenzen, p. 564.

⁶ [1909] 2 Ch. 129.

prevailing in the Transvaal ordains that a married woman cannot be bound as a surety unless she specifically renounces the benefits of the *Senatusconsultum Velleianum*, and also the benefits of another law, *de authentica*. The evidence went to show that this renunciation had not been made in the formal manner required by the local law, since the deed had not been read over and explicitly explained to the defendant before execution by her. In an action brought in England for specific performance of the English transaction, judgment was given both by the court of first instance and also by the Court of Appeal in favour of the defendant.

The decision in both courts was based upon the defendant's lack of capacity. Thus Eve J. said:¹

'The court in dealing with a contract relating to immovables is bound to determine this question of capacity by the *lex situs*, and if the *lex situs* shows that the contracting party had not the capacity to contract, the whole contract is void, and nothing can be done in this country to enforce that contract against the contracting party.'

Again, in the words of Buckley L.J.:²

'Mr. Dicey's language I think is correct, that a person's capacity to make a contract with regard to an immovable is governed by the *lex situs*.'

This decision is far from satisfactory. If the facts raised a true question of capacity, it did not follow that the object of the South African rule was to protect married women domiciled in other countries.³ If a question of form was involved, it is difficult to distinguish the case from that of *Ex parte Pollard*, where a contrary decision was reached.⁴ Again, since the married woman had made a contract valid by English law, the proper law, was she not bound to do everything required by South African law to render it effective?

③ Formalities of alienation.

The formal validity of a transfer of immovables is determined by the *lex situs*.⁵ This is generally taken to mean that a transfer ^{*Lex situs* governs}

¹ At p. 135.

² At p. 143.

³ See this aspect of the matter discussed above, pp. 589-90.

⁴ (1840), Mont. & Ch. 239; *infra*, pp. 619-20.

⁵ Story, s. 435; Dicey, 516; 20 *Yale Law Journal*, 427; *Robinson v. Bland* (1760), 2 Burr. 1077, 1079, *per* Lord Mansfield. But by virtue of Lord Kingsdown's Act, 1861, s. 1 (*supra*, pp. 564 et seqq.), if a British subject makes a will out of the United Kingdom purporting to dispose of *leaseholds* in England, the will may be valid even though not executed in accordance with the formalities prescribed by the *lex situs*: *Re Grassi*, *Stubberfield v. Grassi*, [1905] 1 Ch. 584.

must comply with the formalities prescribed by the internal law of the *situs* for a purely domestic transaction containing no foreign element. Thus it has been held in a case decided before the Wills Act, 1837, that a devise which was valid by the *lex domicilii* of the testator was ineffectual to pass English land, since it was not attested by three witnesses as required by the Statute of Frauds.¹ Nevertheless, it does not inevitably follow that a local formality must in all circumstances be observed. Everything depends upon how it is regarded by the *lex situs* itself. This law may, indeed, regard it as essential for every conveyance, no matter where or by whom executed. On the other hand it may regard the formality as necessary only for conveyances completed within the jurisdiction.²

A contract
to transfer
governed
by a
different
principle

The universal recognition that the *lex situs* is paramount in this respect does not, however, conclude all difficulties. The generality of the rule and the sweeping manner in which it is usually stated are apt to lead to error unless we notice the distinction between an actual transfer of land and a contract to transfer.³ Any transaction or instrument which purports to change, then and there, the ownership of immovables must satisfy the formal requirements of the *lex situs*. But a different position arises where the inquiry relates not to the actual transfer of some interest, but to the rights and liabilities of the parties under a contract relating to immovables. Is a contract by *A* that he will transfer some interest in land to *B* necessarily and exclusively to be governed by the *lex situs*?

Suppose, for instance, that *A* and *B* make a contract in England whereby *A* agrees to grant a mortgage to *B* of land situated in South Africa. If the contract is valid by English law but is not in the form required by South African law for the creation of a mortgage, will an English court uphold the contract, or will it refuse to do so on the ground that the formalities of the *situs* have not been satisfied?

On
principle
formal
validity of
such a
contract
governed
by its
proper law

Jurists give varying answers to the question. Thus, in the eighth edition of Story's *Commentaries* it is stated that 'as to immovables, no contract is binding or obligatory unless the contract is made with the forms and solemnities required by the local law where they are contracted (*lex situs*)'.⁴ It seems

¹ *Coppin v. Coppin* (1725), 2 P. Wms. 291; 24 E.R. 735.

² Cook, op. cit., pp. 265 et seqq.; cf. *supra*, pp. 589-90. In the U.S.A. many statutes have expressly provided that a transfer shall be valid if the formalities of the place of execution are observed.

³ Dicey, p. 517.

⁴ By Bigelow, s. 372 f. The word 'contracted' is curious.

reasonably clear, however, that this is incorrect in principle and that it does not represent the law either of England or of North America. A contract is binding, so far as relates to form, if it satisfies the requirements of the *lex loci contractus*, or of its proper law.¹ If *A* and *B*, two domiciled Englishmen, make a contract in London in such terms that its proper law is that of England, there is no doubt that it is exclusively subject to English law. The mere fact that it relates to foreign land ought not to affect the contractual rights and liabilities of the parties. If it is one whereby *A* has agreed to grant to *B* a mortgage of South African land, an action for breach of contract in the English court will succeed against *A*, even though the same action might fail in South Africa. The court cannot, of course, adjudge that *B* has actually acquired the rights of a mortgagee, for such acquisition necessitates the observance of certain local formalities, but it can decree that *A* shall do all that is necessary by South African law to make *B* mortgagee of the land. The true position, for instance, in *Bank of Africa Ltd. v. Cohen*² would seem to have been that the defendant was contractually bound to grant the mortgage, and that there was no reason why she should not do so. The renunciation required by South African law was within her power, and she had, in effect, agreed to make that renunciation in the proper form.

‘Thus a contract,’ says Burge,³ ‘to sell . . . real property will be valid if the solemnities are observed which are required by the law of the place where the contract is made, and will be the foundation of a personal action against the party to that contract to compel the transport of such property; but no transport will be complete, nor will the dominium in the property have been transferred or acquired, unless those solemnities are observed which are required by the law of the place where it is situated.’

This view was adopted by the Supreme Judicial Court of Massachusetts in an action for breach of covenant, made in North Carolina by parties there domiciled, by which a husband agreed to surrender all his marital rights in certain lands possessed by his wife in Massachusetts.⁴ In the course of his judgment Holmes J. said:

‘It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for

¹ *Supra*, pp. 236–8.

² *Supra*, p. 596.

³ Vol. i, part i, c. i.

⁴ *Polson v. Stewart* (1897), 167 Mass. 211; Lorenzen, *Cases on the Conflict of Laws*, p. 552.

the plain reason that we have exclusive power over the *res*. But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract.⁷

The rule of
English
law

The same view is now taken by English law and it is succinctly stated by Westlake:¹ 'Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution.' In *British South Africa Company v. De Beers Consolidated Mines Ltd.*,² Cozens-Hardy M.R. said:

'In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be effected according to the *lex situs*, is a contract to give a mortgage which—*inter partes*—is to be treated as an English mortgage, and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage.'

It might, perhaps, be objected that this case and Westlake's statement refer to the essential, rather than to the formal, validity of a contract, but it would seem that *In re Smith, Lawrence v. Kitson*³ conclusively supports the view that a contract to transfer an interest in land, sufficient as regards form by its proper law or by the *lex loci contractus* but insufficient by the *lex situs*, is enforceable.

In that case the testator had executed a deed in England by which he charged his land in the West Indies as security for the repayment to his sisters of £1,000, and agreed to execute a legal mortgage whenever required to do so. This deed was not sufficient by the *lex situs* to constitute a valid incumbrance upon the land. In an administration action brought against the trustees of the will it was held that the sisters were entitled to have a legal mortgage executed in their favour according to the requirements of the local law.

Distinction
between
capacity
and formal
validity

It would seem, on principle, that the same distinction between an actual transfer and a contract to transfer must also be relevant in a question of capacity. Where a person contracts in one country to transfer land in another country his capacity

¹ S. 216.

² [1910] 2 Ch. 502, 514. This decision was subsequently reversed, [1912] A.C. 52, on grounds, however, which do not affect the above statement.

³ [1916] 2 Ch. 206.

should be tested by the proper law of the contract. The difficulty, however, of maintaining this view is that, if the contracting party were subject to some incapacity in the true sense, e.g. minority, by the *lex situs* though not by the proper law, it would be futile to subject him to a decree of specific performance that the local law would forbid him to implement. The most that could be done would be to hold him liable in damages.

④ *Essential validity of transfers.*

The general rule laid down in *Nelson v. Bridport*,¹ as we have already seen,² is that no disposition, though made in a country where it may be regular, can create an interest in immovables which is contrary to the *lex situs*. The *lex situs* obviously must decide whether an interest in land is permissible in nature or extent. That law governs exclusively the tenure, title and descent of immovables.³ Although it is a general principle that a legal title duly acquired in one country is a good title all the world over, yet, where the title concerns immovables, it must conform to the *lex situs*.⁴

Exclusively
governed
by *lex situs*

‘Thirdly, in relation to the extent of the interest to be taken or transferred. And here there seems a perfect coincidence between the doctrine of the common law and that maintained by foreign jurists. It is universally agreed that the law *rei sitae* is to prevail in relation to all dispositions of immovable property, and the nature and extent of the interest to be alienated.’⁵

Thus a disposition of English land, whether by will or otherwise, which contains limitations that infringe either the rule against perpetuities⁶ or the Accumulations Act⁷ is void.

A common application of the general principle occurs in the case of those restraints upon alienation which are found in most systems of jurisprudence. Prohibitions against alienation between certain persons, or for certain purposes or beyond a certain amount, are frequently met with, and in fact most of the Continental systems of law forbid testators to devise more than a certain proportion of their property. When the subject-matter of alienation is an immovable the application of such restraints depends solely upon the *lex situs*.

Principle
exemplified
by re-
straints on
alienation

¹ (1845), 8 Beav. 547.

² *Supra*, pp. 588 et seqq.

³ *Fenton v. Livingstone* (1859), 33 L.T. (O.S.) 335.

⁴ *Simpson v. Fogo* (1863), 1 Hem. & M. 195.

⁵ Story, s. 445.

⁶ *Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584, at p. 592 (Buckley J.).

⁷ *Freke v. Carbery* (1873), L.R. 16 Eq. 461.

The treatment by the courts of the English mortmain statutes, which imposed severe restrictions upon devises of land to a charity, provided an apt illustration of this general principle until those statutes were swept away in 1960.¹ Since, broadly speaking, the policy was to prevent the excessive accumulation of land by way of devise in the hands of perpetual bodies, it followed that the decisive factor in considering the validity of a charitable devise was not the domicile of the testator, but the country where the land was situated. A devise or gift of English land contrary to the statutes was void, even though valid by the *lex domicilii* of the donor,² but whether a gift of foreign land was void for the same reason depended upon the *lex situs*.³

In re *Piercy* A somewhat troublesome case in this connexion is *In re Piercy*,⁴ where an unduly ephemeral operation was allowed to the foreign *lex situs*. The facts, so far as relevant to the present discussion, were these:

A testator, domiciled in England, devised his Sardinian land to trustees upon trust for sale, and to hold the same until conversion and the proceeds of sale after conversion upon certain trusts for his children for their respective lives, with remainder to their issue. Italian law would regard the children as entitled to their shares absolutely, since it does not allow trusts of that kind to be imposed upon land in Italy.

The unsophisticated might conclude that the land must be allowed to remain subject to Italian law, and that any move to subject it, directly or indirectly, to the English trusts would be contrary to principle as being a contravention of the *lex situs*. North J., however, was of a different opinion. He admitted, indeed, that the land was subject to Italian law as long as it remained unsold, but, apart from that concession, he directed the trustees to sell the land and to hold the proceeds upon the trusts declared by the will. His reasoning, ingenious if not sound, was that by Italian law it was not illegal for the testator to direct the sale of his land, that Italian law *qua* the *lex situs* would continue to govern the land in the hands of the purchaser, but that it had nothing whatever to do with the proceeds of sale, for by that time the land would have been placed outside the scope of the will. But, by Italian law, the beneficiaries under

¹ Charities Act, 1960, s. 38.

² *Curtis v. Hutton* (1808), 14 Ves. 537; *Duncan v. Lawson* (1889), 41 Ch.D. 394.

³ *In re Hoyles, Row v. Fagg*, [1911] 1 Ch. 179. It seems no longer necessary to consider the unsatisfactory decision in *Canterbury (Mayor) v. Wyburn*, [1895] A.C. 89 (P.C.).

⁴ [1895] 1 Ch. 83.

such a disposition become absolute legal owners of the land, the executors and trustees having nothing more than a mere right of administration.¹ No dealing with the land could be effective unless it complied with Italian law, and by that law the sale directed by the judge was illegal.² Was it not, therefore, a deliberate evasion of Italian law to place the land in the hands of a nominal owner whose true position was only that of a trustee?³

What probably weighed with the learned judge was that the land had become money under the equitable doctrine of conversion, but, as Beale points out, whether such a conversion has been effected depends upon the *lex situs*, and by Italian law the answer was most definitely in the negative.⁴

5. Succession.

Most foreign countries have adopted the principle of unity of succession by which questions relating to intestacy or to wills are governed by one single law, the personal law of the deceased, irrespective of the nature of the subject-matter. England, however, together with other Anglo-Saxon countries, has consistently adhered to what is called the principle of scission under which the destination of immovables on the death of the owner is governed by the *lex situs*, not by the law of his domicile as in the case of movables.⁵

Accordingly, where the owner of immovables dies intestate, the order of descent or distribution prescribed by the *lex situs* is applied by the English court no matter what his domicile may have been.⁶

Thus, in an Irish case,⁷ a domiciled Irishman died intestate without issue in Ireland owning certain land in Victoria. In such circumstances a widow is entitled by a Victorian statute to a charge of £1,000 upon

¹ Wolff, p. 592.

² Cp. the remarks of Lord Reid in *Philipson-Stow v. Inland Revenue Comrs.*, [1960] 3 W.L.R. 1008, 1019.

³ Cp. *Brown v. Gregson*, [1920] A.C. 860, at p. 886, *per* Lord Moulton.

⁴ Beale, ii. 959.

⁵ For a fuller account of the opposing principles see Wolff, *op. cit.*, pp. 567 et seqq.; and 5 *I. & C.L.Q.* 395 et seqq.

⁶ *Balfour v. Scott* (1793), 6 Bro. Parl. Cas. 550; *Duncan v. Lawson* (1889), 41 Ch.D. 394. When the immovables are situated in a country that adopts the principle of unity, this means that, subject to the acceptance of the *renvoi* doctrine by the *lex situs*, the order of descent may be that of England; cp. *In re Welling-ton*, [1947] Ch. 506; *supra*, p. 78.

⁷ *In re Rea, Rea v. Rea*, [1902] 1 Ir.R. 451.

land in the colony. The land having been sold and the proceeds remitted to Ireland, it was held that the widow was entitled to the £1,000, since her rights were those conferred by the *lex situs*.

Wills of
land
governed
by *lex situs*

With regard to wills of immovables the rule of the common law is that it is the *lex situs*, and the *lex situs* exclusively, which decides whether the testator has capacity,¹ whether the appropriate formalities for the making² or for the revocation³ of a will have been observed, whether the testator has an unlimited or only a restricted power of disposition,⁴ and whether the interest devised is essentially valid.⁵ The law of the testator's domicile has no effect upon these matters, whether the subject-matter of the will is a freehold or a leasehold interest.⁶ There are two exceptional cases, however, in which the *lex situs* is not decisive. The first is created by the Inheritance (Family Provision) Act, 1938.⁷ The other occurs in the case of a bequest of English *leaseholds*, for, though the will in which this is contained does not satisfy the formalities of domestic English law, it will nevertheless be valid in respect of form, but in no other respect, if it is made by a British subject and if there has been compliance with one of the legal systems specified by Lord Kingsdown's Act, 1861.⁸

Effect of a
contract by
testator

The general rule, that the *lex situs* determines whether a testator is free to dispose of land which he has in terms disposed of, may, of course, be excluded by a contract previously made by him. In such a case reference must be made to the law that governs the contract. The point arose in *De Nicols v. Curlier* (No. 2).⁹

The House of Lords had decided in the first case between these parties that a marriage contract implicitly made in France, concerning the mutual rights of the spouses to the matrimonial property, was binding on movables subsequently acquired in England where the husband died domiciled.¹⁰ The

¹ See *In re Hernando, Hernando v. Sawtell* (1884), 27 Ch.D. 284, where the proposition, so far as related to the English land, was undisputed.

² *Coppin v. Coppin* (1725), 2 P. Wms. 291; *supra*, p. 598.

³ *In the estate of Alberti*, [1955] 1 W.L.R. 1240.

⁴ Story, ss. 445 and 474, notes, citing Burge.

⁵ *Freke v. Carbery* (1873), L.R. 16 Eq. 461; *Duncan v. Lawson* (1889), 41 Ch.D. 394.

⁶ *Pepin v. Bruyère*, [1900] 2 Ch. 504; *De Fogassieras v. Duport* (1881), 11 L.R. Ir. 123; *Freke v. Carbery*, *supra*.

⁷ *Supra*, p. 590.

⁸ *Re Grassi, Stubbsfield v. Grassi*, [1905] 1 Ch. 584. For the provisions of the statute see *supra*, pp. 564 et seqq.

⁹ [1900] 2 Ch. 410.

¹⁰ *Supra*, p. 48.

question that now arose was whether the French contract or the English *lex situs* determined the rights of the surviving wife to the English immovables of her deceased husband. Kekewich J. held that the implied contract must operate according to the intention of the parties so as to bind the freehold and leasehold estates of the deceased, unless there was any overriding rule of English law which would render it unenforceable. The only possible rule was the provision of the Statute of Frauds requiring a written memorandum in the case of a contract concerning land, but the learned judge held that, since this particular contract constituted a partnership between the spouses in the eyes of French law, it fell within the rule of English law that a parol agreement for a partnership is not caught by the statute and is enforceable despite the lack of written evidence. The accuracy of the view expressed by the learned judge, that the contract implied by French law included foreign immovables, is open to doubt. His decision might have been based more surely upon counsel's other argument, namely, that the land represented the investment of money acquired by the husband during marriage, and that the wife could follow the money, to which she was admittedly entitled, into whatsoever form it had been converted.¹

A somewhat difficult question arises with regard to the construction of wills of immovables. We have already seen that a bequest of movables is construed according to the law intended by the testator, which is generally the law of his domicile at the time when he prepared his will.² The problem is whether the English authorities extend the same rule to wills of immovables, or whether they require that exclusive respect shall be paid to the *lex situs*.

Textbook writers are not in agreement. Dicey maintains that there is a presumption in favour of the law of the testator's domicile at the time when the will was made, though this is rebutted by evidence that he had another law in mind.³ Westlake⁴ says that no general rule can be laid down, but that a reasonable regard must be had to systems of law other than the *lex situs*. According to Halsbury's *Laws of England*, 'unless an intention to the contrary on the part of the testator is established, the construction of a will of immovables is governed by the *lex loci rei sitae*'.⁵ Story⁶ advocates the *lex domicilii*, asserting

What law governs the construction of wills?

Views of the jurists

¹ For a discussion of the case see Westlake, pp. 74-75.

² *Supra*, pp. 580-3.

³ P. 528.

⁴ S. 170.

⁵ Vol. 7, p. 63.

⁶ Ss. 479 a-f; 484.

that it is that system of law which must decide, for instance, whether the terms of a will show on the part of the testator an intention to pass immovables as well as movables, whether a beneficiary is to take an estate for life or in fee, and who are the proper persons to take under some general designation such as 'heirs', 'next of kin' or children. Another learned American writer, however, says:¹

'Public convenience requires that, in the case of rules of construction as in the case of rules of property, the rules of the *situs* should govern. To secure the expeditious and safe transfer of titles to real estate, it is far preferable that the law of the *situs* should be indiscriminately applied to all wills of real estate, whatever be the domicile of the testator, than that several wills, all containing the same language and all devising real estate in the same jurisdiction or even devising the same real estate at different dates, should be differently construed by the courts of the *situs*, according as the domicils of the testators established different rules of construction.'

The state courts of America are equally disagreed, some submitting the question of construction to the *lex domicilii*,² others remaining staunch by the *lex situs*.³

On principle, law intended by testator governs construction. It is submitted, however, that there is little difficulty if we resort to first principles, and determine what are the natural provinces of the *lex domicilii* and of the *lex situs* respectively in this matter. It must be conceded that the object of every court in the civilized world, when dealing with a will, is first to ascertain the intention of the testator and then to give effect to that intention so far as is consonant with the governing law. In the ascertainment of this intention, where the will has reference to more countries than one, it may be a matter of great moment whether the testator's language is read in the light of this or that legal system, for it frequently happens that the same word or phrase, such as 'heirs of the body', bears a different signification in different countries. As Lord Lyndhurst said in *Trotter v. Trotter*:⁴

'There are certain rules of construction adopted in the courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction.'

¹ Hening in 41 *American Law Reg.* (N.S.), 623, 718, cited in Goodrich on *Conflict of Laws* (3rd ed.), p. 511.

² *Guerard v. Guerard*, 73 Ga. 506; *Proctor v. Clark*, 154 Mass. 45; *Ford v. Ford*, 70 Wis. 19; *Keith v. Eaton*, 58 Kan. 732; Lorenzen, 788.

³ *Peet v. Peet*, 229 Ill. 341; Lorenzen, 853; *Jennings v. Jennings*, 21 Ohio St. 56.

⁴ (1828), 4 Bligh 502.

It follows, therefore, in such a case that the result which the testator intended will not ensue unless we discover the system of law which he had in mind when he wrote the will. The presumption should be in favour of the *lex domicilii* at the time of the making of the will, for that is the system of law under which he lives and with which he is expected to be familiar.

'That is the law', said an American judge,¹ 'which is constantly with him, controlling his actions and defining his rights, and more naturally than any other law would be present to his mind in the drafting of an instrument dispositive of his property.'

It may, of course, be some other system, such as the *lex situs*, for the inquiry turns wholly upon intention, and if there is anything clearly indicative of a desire to exclude the *lex domicilii*, the will must be construed accordingly. Thus, if a domiciled Englishman, possessing land in Scotland, were to adopt in his will the expression 'tailzied fee', it would be reasonable to conclude that he wished Scottish law to govern his disposition. Similarly if he made one will for the land and a separate will for his English property.²

Where a testator is domiciled in one country and has land in another, the fact to be borne in mind, then, is that the *lex situs*, as such, has no paramount claim to exclusive recognition. Otherwise the result may be to defeat intention.

Law intended by the testator is not necessarily the *lex situs*

Thus, a testator frequently leaves property, not to named persons, but to those persons who would be entitled were he to die intestate. It is obvious, in such a case, that his intention is to benefit the successors admitted by the law of his domicile, since it is that system with which he is familiar, and it can scarcely be denied that arbitrarily to make a new will for him by admitting a different line of succession imposed by a foreign *lex situs*, merely because the will includes a certain amount of land situated abroad, would constitute a departure from principle.

An apt illustration is given by Burge:³

'Thus in case the limitation of a deed or will were made in England in favour of the "heir" of A, a person who had no children, and the settlor or testator has property in England, Jamaica and British Guiana, if the construction of the word "heir" was to be in conformity with the law of England, the father of A would take, if according to the law of Jamaica the elder brother, and if according to the law of British Guiana his father, brothers and sisters would take his immovable property. It

¹ *Keith v. Eaton* (1897), 58 Kan. 732; Lorenzen, p. 788, per Doster C.J.

² As in *In re Duke of Wellington*, [1947] Ch. 506.

³ *Commentary on Colonial and Foreign Laws* (1838 ed.), vol. ii, part 2, p. 858.

is not to be presumed that he used the expression in three different senses, or that he adopted the legal import given to it by the law of the one place, rather than that given to it by the law of either of the other two places. But if his domicile were in England, there is the presumption that he was acquainted with the sense attached to it by the law of England, and that he used it in this sense.'

Cases in which wills must be construed according to *lex situs*

The adoption of this principle does not infringe any local rule of the *lex situs*, nor does it derogate from the sovereign power of the country in which the land is situated. All courts, in administering private international law, desire to give effect to expressed intentions, provided that this does not conflict with the public policy of the forum or of the *situs*, and it is a matter of indifference that *A* takes land under a will which has been construed according to the law of the testator's domicile, though *B* would have taken had the construction been that of the *lex situs*. This, however, gives us the clue to the limits of the doctrine. If the rules of the *lex situs* make it illegal or impossible to give effect to the will as construed by the system of law intended by the testator, the general principle must perforce give way, and the construction adopted must be that of the *lex situs*. Or again, if the interest arising from a will which has been so construed possesses incidents different in the *situs* from what are recognized by the *lex domicilii*, the *lex situs* must prevail, for it is that law which determines the nature and extent of estates and interests in immovables. The testator may, indeed, make his own dictionary, but the *lex situs* has the last word.

Rule as to construction finally stated

We venture, then, to state the law as follows:

A will of immovables must be construed according to the system of law intended by the testator. This is presumed to be the law of his domicile at the time when the will is made, but the presumption will be rebutted if evidence is adduced from the language of the will proving that he made his dispositions with reference to some other legal system. If, however, the interest that arises from such construction is not permitted or not recognized by the *lex situs* the latter law must prevail.

It now remains to examine the English authorities with the view of discovering whether the principle that has been stated above is accepted in this country.

Studd v. Cook

It was decided in *Studd v. Cook*,¹ an appeal to the House of Lords from the Court of Session in Scotland, that the size of

¹ (1883), 8 App. Cas. 577.

estate which a devisee takes depends upon the law of the testator's domicile. In that case:

A domiciled Englishman, possessing land in both England and Scotland, made a will in terms appropriate to English law by which he devised all his land to the use of *X* for his life, without impeachment of waste, remainder to the use of the first and every other son of *X*, 'successively, according to their respective seniorities, in tail male'. By English law *X* took a mere life interest, but by Scottish law he was entitled to the fee simple. It was held that the testator clearly intended the limitations of his will to be understood in their English sense, since he had used technical language familiar to English conveyancing, and that therefore his intention was effective so far as the law of Scotland permitted.¹

This case is distinguishable from *In re Miller*, Bailie v. Miller,² where a different principle was at stake.

By a trust disposition, made in Scottish form and executed in a form sufficient to constitute a valid will by English law, *A*, a domiciled Scotsman, after conferring a life interest upon his wife, gave his land in Scotland and his London house 'for behoof of my eldest son, James . . . and the heirs male of his body in fee', with remainders over. James, who presumably was also a domiciled Scotsman, died without issue and without having executed any disentailing assurance of the London house. He made, however, a trust disposition in Scottish form, executed in the manner required by English law for the execution of wills, by which he disposed of the whole of his real and personal property.

By English law, as it stood, the will of James was ineffectual to pass the estate tail in the London house, which would therefore pass to the remainderman under the will of *A*. By Scottish law the will of *A* did not create a strict entail but gave James an interest which he could dispose of either *inter vivos* or by will. It was held that the question whether James had power to dispose of his London house by will must be decided according to English law.

It would seem that this decision is not inconsistent with *Studd v. Cook*. The latter decided that a will should be construed according to the *lex domicilii* in order to ascertain the size and nature of the interests that the testator intended to give. *In re Miller* did not raise a question of construction only. What the advocates of Scottish law attempted in effect to maintain was that *A*'s disposition did create an estate tail, but at the same time an estate tail with Scottish and not English incidents.

¹ 40 L.Q.R. 479.

² [1914] 1 Ch. 511. See also *Nelson v. Bridport* (1845), 8 Beav. 547; *supra*, p. 588.

According to Scottish law, the interest of *A* was at least a species of estate tail, for, failing a disentailing assurance or a testamentary disposition, it would pass to his male issue, or if no such issue, to the remainderman. A devisable estate tail, however, was unknown in England before 1926; and to frame a settlement under English law which would correspond to the limitations as recognized by Scottish law would be a task of extreme nicety. The question was not—Which of the various estates recognized by English law did *A* intend to create? Rather it was—Did English law recognize the estate which *A* had purported to create?

Whether
an heir
must elect
is deter-
mined by
law of
testator's
domicil

The rule that a will of immovables does not necessarily depend upon the *lex situs* receives further support from the English cases dealing with the doctrine of election.

Suppose, for instance, that a domiciled Englishman makes a will by which he devises his son's foreign land to *X* but gives £50,000 out of his own property to his son. The rule of domestic English law applicable to these circumstances is that, if the testator clearly intended to dispose of the land in favour of *X*, the son cannot claim the whole of the £50,000 unless he adopts the testamentary disposition of the land. He must elect, i.e. he must either keep the land and have the legacy correspondingly reduced, or must recognize the whole of the will by taking his legacy in full and abandoning the land to *X*. Election is based upon the presumption that a testator intends his will to take effect in its entirety.

The rule of English private international law is now well settled that where a testator disposes of property in more countries than one, the question whether a beneficiary is put to his election is governed by the law of the testator's domicile.¹ This is so even though the subject-matter of the election is land situated abroad, for, though the courts of the domicile cannot withhold the land from the person to whom it belongs according to the *lex situs*, they can, in the administration of the movables which is their particular province, insist that if he retains the land he shall give effect to the intention of the testator by providing compensation out of the legacy. The English court in adopting this attitude does not interfere with

¹ *Trotter v. Trotter* (1828), 4 Bligh 502; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705; *Brodie v. Barry* (1813), 2 V. & B. 127; *Dundas v. Dundas* (1830), 2 D. & C. 349; *Orrell v. Orrell* (1871), 6 Ch. App. 302; *Dewar v. Maitland* (1866), L.R. 2 Eq. 834; *Johnson v. Telford* (1830), 1 Russ. & My. 254; *In re Ogilvie*, [1918] 1 Ch. 492. This rule was overlooked by Cohen J. in *In re Allen's Estate*, [1945] 2 All E.R. 264, as to which case see Dicey, p. 620; 24 Can. B.R. 528 et seqq. See also the same writer in 10 *Conveyancer* (N.S.), p. 102.

the *lex situs*. The foreign heir comes to the court, not as heir to the land, over which the court has no jurisdiction, but as legatee of movable property which is being administered in England. It can thus be said to him: 'We have no power to dispense with the provisions of the foreign law relating to wills of land, but you come to us as legatee under the will of a testator domiciled in England; and if you claim the legacy you must also recognize the disposition which the will has purported to make of the land.'¹ It is always open to the heir to ignore the English administration and to claim the land under the territorial law.²

If a case, then, involving the doctrine of election falls to be considered in England the court turns to the law of the testator's domicile. That domicile may be English or foreign. If it is English, the court merely considers whether the domestic doctrine of election is applicable to the circumstances in question; if it is foreign, its sole guide is the law of the foreign domicile.³ In *Balfour v. Scott*:⁴

Lex situs
does not
govern
election

A person domiciled in England died intestate leaving immovables in Scotland. The heir to the Scottish land was also one of the next of kin, and as such he claimed a share of the English movables. It was objected to this claim that by the law of Scotland an heir could not share in movables unless he consented to the immovables being massed with the movables so as to form one common subject of division. This, however, was not the English rule, and it was therefore held that the heir could take his share as one of the next of kin without complying with the rule of the *lex situs*.

So far as concerns private international law the question of election generally arises where the testator devises his own land away from the heir by a will which is void, either formally or essentially, according to the *lex situs*, but bequeaths by a valid will a legacy to the disappointed heir. The question arises here whether the heir must elect, i.e. if he claims the land on the ground that the will is invalid, can he retain the legacy in full

Questions
of election
where the
will is void
as to im-
movables

¹ Compare the words of Lord Brougham in *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349, at 375.

² The present account of election is confined to a case where movables are bequeathed to the owner of the foreign land. In such a case the rule given above, that the *lex domicilii* governs, is correct. But it is not correct, as is pointed out in Dicey (6th ed.), p. 553, criticizing the third edition of this book, if English land is left to the foreign heir and foreign land left away from the heir. Here the English *lex situs* governs irrespective of domicile.

³ *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349.

⁴ (1793), 6 Bro. Parly. Cas, 550.

or must he make compensation out of it to the disappointed devisee?

Privileged
position of
heir of Eng-
lish land

This situation was possible in England prior to 1837 *in a purely domestic case*, for, until the law was altered by the Wills Act, the formalities necessary for a valid will varied according as the subject-matter of the disposition was realty or personalty. In this state of the law it was established as early as 1749 in *Hearle v. Greenbank*¹ that, if a testator devised his English freeholds to a stranger and bequeathed legacies to the heir-at-law in a will that was valid as to personalty but void as to realty, the heir was not bound to elect, unless there was an express direction that anyone who disputed any part of the will should forfeit all benefits.² He was entitled both to the land and to the legacies. Although this situation can no longer arise in the case of an English will disposing of English property, it may well do so where the testator is domiciled abroad. Suppose that:

A testator domiciled in Italy makes a will by which he devises his *English* entailed interests to *X* and bequeaths a legacy to *Y*, who is his heir-at-law according to English law. The will is formally valid by Italian law but ineffective by English law.

In such a case as this it has been held, following the principle of *Hearle v. Greenbank*, that the English heir is not put to his election.³ He can claim the land as heir against the invalid will of realty, and retain the legacy under the bequest which, since its validity falls to be determined by the *lex domicilii*, is invulnerable. This is an example of that 'special tenderness' which the courts have always shown to the heir-at-law of English land,⁴ though now that the heir has been abolished for fee simple estates in England it is doubtful whether a similar indulgence will be extended to those relatives who are entitled to the residuary estate of an intestate person. It is an inequitable privilege established by the courts at a time when they particularly favoured the heir-at-law and frowned upon any attempt to defeat his rights.

Foreign
heir com-
pelled to
elect

This tenderness has never been shown to a foreign heir, i.e. to the heir entitled to take foreign land under the rules of intestate succession recognized by the *lex situs*. The attitude of English law with regard to election in a case of this sort can

¹ (1749), 1 Ves. Sen. 298.

² *Boughton v. Boughton* (1750), 2 Ves. Sen. 12.

³ *In re de Virte*, [1915] 1 Ch. 920.

⁴ *In re Ogilvie*, [1918] 1 Ch. 492, 496, *per* Younger J.

be illustrated from *In re Ogilvie*,¹ where the facts were as follows:

A domiciled Englishwoman devised her land in Paraguay to a charity and gave legacies to the persons who were the obligatory heirs of the land according to Paraguayan law. The charitable devise was void by the *lex situs* to the extent of four-fifths, which was the portion reserved for the obligatory heirs. Moreover, according to the *lex situs*, the right of an heir to his legal portion was not affected by any other benefit that he might have received under the will.

In a case of this description, English law, as being the law of the testator's domicile, determines whether the foreign heir is to be put to his election. This raises the question of construction whether the testator has manifested an intention to pass the foreign land, for if he has, then despite the invalidity of the will by the *lex situs* the doctrine of election becomes applicable.² The rule evolved by English courts on this matter is that the foreign property must be described either specifically or by necessary implication.³ Thus, if a testator uses only general descriptive words, as, for example, where he says,

'I devise all my estate, whatsoever or wheresoever, whether in possession or reversion',

he is taken to intend that his disposition shall be restricted to such land as he is empowered to pass by a will executed in that particular form.⁴ There was no difficulty of this sort in *In re Ogilvie*, since the testatrix had shown a plain intention to pass the Paraguayan property, and therefore it was held that the obligatory heirs must elect between what they took by the *lex situs* owing to the invalidity of the charitable devise and what they were given in the shape of legacies by the will.

'If', said Younger J., '[the court] finds that an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, and has, in fact, *so far as words are concerned*, effectually so disposed of it, this court merely says that it is against conscience that that foreign heir, given a legacy by the same will, and to that extent an object of mere bounty on the part of the testator, shall take and keep, under the protection of the foreign law, the land by the will destined for another, without making to that other out of his

¹ [1918] 1 Ch. 492.

² *Trotter v. Trotter* (1828), 5 Bligh (N.S.), 502.

³ *Maxwell v. Maxwell* (1852), 16 Beav. 106; *Orrell v. Orrell* (1871), L.R. 6 Ch. 302.

⁴ *Maxwell v. Maxwell* (1852), 16 Beav. 106.

English legacy, so far as it will go, compensation for his disappointment, thus effectuating the testator's whole intentions.'¹

No election
if intended
devise
illegal by
foreign
lex situs

The House of Lords, however, in an appeal from the Court of Session in Scotland, has held that a foreign heir will not be put to his election if it would be impossible by the *lex situs* to give effect to the disposition of the foreign land intended by the testator.² In that case:

A domiciled Scotsman made a will by which he left his estate, including lands of great value in the Argentine, to trustees to be held by them upon certain trusts for his children. There was a provision that the trust dispositions should be accepted in full of *legitim*, and that if any child repudiated the will and claimed his *legitim* he should forfeit all title to any share of the estate which the testator was free to dispose of by will. All trusts of land are illegal in the Argentine and therefore the will was a nullity so far as the land in that country was concerned. The children, taking advantage of the *lex situs*, succeeded to the land in equal shares *ab intestato*.

It was held on these facts, Viscount Cave dissenting, that they were not bound under the Scottish doctrine of approbate and reprobate (which is analogous to the English doctrine of election) to surrender to the uses of the will the shares to which they succeeded by virtue of the *lex situs* as a condition of taking the other benefits conferred upon them by the will. To impose such a choice upon them would be to evade an Argentine rule based upon public policy.

II. THE EFFECT OF EQUITABLE JURISDICTION IN PERSONAM ON FOREIGN IMMOVABLES

A Court of
equity by
operating
in personam
may affect
foreign im-
movables

One result, as we have seen, of that exclusive sovereignty and jurisdiction which a State possesses within its own territory is that a court cannot, by its judgments or decrees, directly bind or affect land which lies within the confines of another State. But the reason upon which this maxim is based has no force where the issue before the court is not a *iuris in rem* relating to foreign immovables, but a personal obligation enforceable against the defendant. The objection that a court has no jurisdiction owing to the foreign *situs* of the *res litigiosa* is fatal to an action *in rem*, but is no answer to an action *in personam*.

'The English Courts of Equity are, and always have been, courts of conscience operating *in personam* and not *in rem*, and in the exercise of

¹ [1918] 1 Ch. at p. 502.

² *Brown v. Gregson*, [1920] A.C. 860.

this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction.¹

The primary essential is that the defendant should be subject to the general jurisdiction of the court. This jurisdiction, as we have seen, is founded upon his presence in England, but as regards the power to pronounce a decree *in personam* against him it is equally well founded by service of notice of a writ under Order XI.²

Defendant
must be
amenable
to the
jurisdiction

‘The moment a person is properly served under the provisions of Order XI, that person, so far as the jurisdiction of this court is concerned, is in precisely the same position as a person who is in this country.’³

Once the court is thus empowered to take cognizance of the matter, the doctrine that equity acts *in personam* may be freely and effectively applied. A decree may be issued which, though personal in form, will indirectly affect land abroad.

If, for instance, a mortgagee of land in the West Indies refuses to reconvey upon receipt of principal, interest and costs, there is no way by which a direct transfer of the property to the mortgagor can be effected at the instance of the English court. But the court can indirectly produce the desired result by saying to the recalcitrant mortgagee, ‘You are subject to our jurisdiction by reason of your presence in England, and if you refuse to take the steps required by the *lex situs* for a reconveyance of the property to the mortgagor, we shall imprison you or sequester your English property until you comply.’

‘Courts of Equity have,’ said Wright J., ‘from the time of Lord Hardwicke’s decision in *Penn v. Lord Baltimore*, exercised jurisdiction *in personam* with respect to foreign land against persons locally within the jurisdiction of the English court in cases of contract, fraud and trust, enforcing their jurisdiction by writs of *ne exeat regno* during the hearing and by sequestration, commitment or other personal process after decree.’⁴

The distinction is that the court cannot act upon the land directly, but acts upon the conscience of the defendant.⁵

¹ *Ewing v. Orr-Ewing* (1883), L.R. 9 A.C. 34, 40, *per* Lord Selborne.

² *Supra*, pp. 111 et seqq.

³ *In re Liddell’s Settlement Trusts*, [1936] Ch. 365, 374, *per* Romer L.J.

⁴ *British South Africa Co. v. Companhia de Moçambique*, [1892] 2 Q.B. 358, at p. 364.

⁵ *Cranstown v. Johnston* (1796), 3 Ves. Jr. 170, *per* Sir R. P. Arden M.R. at p. 182.

Penn v. Baltimore This right to affect foreign land was finally established by the decision in *Penn v. Baltimore*¹ in 1750. In that case:

Facts: A contract had been made in England between the plaintiff and the defendant, by which a scheme was arranged for fixing the boundaries of Pennsylvania and Maryland. To a suit for specific performance brought in this country the defendant objected that the court had no jurisdiction, since it could neither make an effectual decree nor execute its own judgment. Lord Hardwicke, while admitting that he could not make a decree *in rem*, granted specific performance, on the ground that the strict primary decree in a court of Equity was *in personam*.

Extensive operation of jurisdiction in personam The exercise of this jurisdiction, of course, is not confined to questions concerning foreign land. It extends to any case where the defendant has been guilty of conduct that in the eyes of the court is contrary to equity and good conscience. An important example of the general jurisdiction occurs where a person who is amenable to the jurisdiction commences legal proceedings abroad the institution of which is inequitable. In such circumstances the court does not hesitate to issue an injunction in restraint of the foreign proceedings, for a decree of this nature is not directed against the authority of the foreign court but merely commands a person within the English jurisdiction what he is to do.²

'In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad—if, for instance, as in *Penn v. Baltimore*, it can decree the performance of an agreement touching the boundary of a province in North America . . . in precisely the like manner it can restrain the party within the limits of the jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or the prosecution of an action in a foreign court.'³

Even where a person has actually obtained judgment abroad, an injunction may be issued restraining him from reaping its fruits, if he has obtained it in breach of some contractual or

¹ (1750), 1 Ves. Sen. 444.

² *Bushby v. Munday* (1821), 5 Madd. 297; *Portarlington v. Soulby* (1834), 3 My. & K. 104; *Carron Iron Co. v. Maclaren* (1855), 5 H.L.C. 439.

³ *Portarlington v. Soulby* (1834), 3 My. & K. 104, 108-9, per Lord Brougham.

fiduciary duty or in a manner contrary to the principles of equity and conscience.¹

We must now, however, confine the discussion to the manner in which the exercise of this personal jurisdiction may affect foreign land. The jurisdiction as affecting foreign land

The fundamental requirement is that the defendant should be subject to some personal obligation arising from his own act, for it is only when his conscience is affected that the court is entitled to interfere. There is comparative agreement among writers and judges as to the acts which impose a personal liability upon a party, sufficient to found the jurisdiction,² but the most exhaustive statement of the law has been made by Parker J. in the following words:³ Must be a personal equity

'In my opinion the general rule is that the court will not adjudicate on questions relating to the title to, or the right to possession of, immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend upon the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property.'

It will lead, perhaps, to a better appreciation of the subject if we attempt to tabulate the various circumstances which have been considered sufficient to raise the necessary personal equity.

(i) *Contracts relating to foreign land.*

It is clear that a party to a contract concerning foreign land is subject to a personal obligation which affects his conscience and which can be enforced by the personal process of a court of equity.⁴ The existence of a contractual obligation was the ground of the decision in *Penn v. Baltimore*.⁵ In the very early Contract imposes a personal obligation upon the parties

¹ *Ellerman Lines Ltd. v. Read*, [1928] 2 K.B. 144.

² 'Obligations arising from, or as from, a person's own contracts and torts' (Westlake, s. 172); 'upon the ground of a contract or other equity subsisting between the parties respecting property situated out of the jurisdiction' (Foote, p. 224); 'either a contract between the parties to the action or an equity between such parties' (Dicey, p. 151); 'contract, fraud and trust' (Wright J., *British South Africa Co. v. Companhia de Moçambique*, [1892] 2 Q.B. at p. 364).

³ *Deschamps v. Miller*, [1908] 1 Ch. 856 at p. 863.

⁴ *British South Africa Co. v. De Beers Consolidated Mines Ltd.*, [1910] 2 Ch. 502, at pp. 523-4, *per* Kennedy L.J.; *St. Pierre v. South American Stores*, [1936] 1 K.B. 382; *Cood v. Cood* (1863), 33 L.J. Ch. 273.

⁵ *Supra*, p. 616.

case of *Archer v. Preston*¹ the defendant, who refused to perform a contract for the sale of land in Ireland, was successfully sued for specific performance while on a casual visit to England. Again, in a modern case,² a decree for specific performance was made against the English executors of a testator who had agreed for valuable consideration to execute a legal mortgage of land in the island of Dominica.

(ii) *Fraud and other unconscionable conduct.*

Fraud imposes personal obligation on guilty party

The objection was raised as long ago as 1682, in the case of *Arglasse v. Muschamp*,³ that the English court has no jurisdiction to hear a suit founded on fraud if the fraud is concerned solely with foreign land. In overruling the objection the Chancellor stigmatized it as 'only a jest put upon the jurisdiction of this court by the common lawyers'. Fraud is an extrinsic, collateral act, violating all proceedings, even those of courts of justice,⁴ and it always creates a right in the injured party to sue the defendant *in personam* wherever he can find him, no matter where the cause of action has arisen or where the subject-matter of the action is situated. The leading case is *Cranstown v. Johnston*.⁵

The plaintiff was liable under an arbitrator's award to pay to the defendant at Lloyd's Coffee House in London the sum of £2,521. 10s. 9d. but owing to absence abroad he was unable to make the payment at the required time. He was entitled to a plantation of great value in the island of St. Christopher. The law of that island allowed a creditor to proceed against an absent debtor after leaving a summons at the freehold of the debtor and nailing another on the court-house door. The defendant availed himself of this procedure, and after judgment had been obtained without any actual notice to the plaintiff, the plantation was seized by the Provost-Marshal and the plaintiff's interest therein sold to the defendant for £2,000, which was far less than its true value. The plaintiff filed a bill for relief in the English Court of Equity.

The Master of the Rolls decreed that upon receipt of what was due for principal, interest and costs the defendant should reconvey the plantation to the plaintiff. He did not deny that what had been done was in accordance with the *lex situs*, but he

¹ Undated but cited in *Arglasse v. Muschamp* (1682), 1 Vern. 75, 77.

² *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206; *supra*, p. 600.

³ (1682), 1 Vern. 75.

⁴ *Duchess of Kingston's Case* (1776), Harg. State Trials, 602, *per De Grey* L.C.J.; *White v. Hall* (1806), 12 Ves. 321.

⁵ (1796), 3 Ves. Jr. 170.

pointed out that the defendant had used the local law not to satisfy the debt, but to obtain an estate at an inadequate price. This was a 'gross injustice' sufficient to justify the court in acting upon the conscience of the defendant.

(iii) *Fiduciary relationship.*

A trust attached to foreign land may be enforced by the ^{Trust} English court, provided that the trustee is present in this country.¹ This is so, even though the author of the trust is domiciled abroad.²

Again, a personal equity arising from a mortgage of foreign ^{Mortgage} land may justify an action in this country. Thus, where the mortgagor of land in Jamaica had obtained a decree from the English court which directed certain accounts to be taken with a view to redemption, the court granted an injunction restraining the mortgagees, who were present in England, from instituting foreclosure proceedings in Jamaica.³ The mortgagor had a clear equity to be protected from a double account. The same principle applies to foreclosure proceedings. In English proceedings a decree in a foreclosure suit is merely a decree *in personam* since it destroys the right of redemption given by equity to the mortgagor, and it can therefore be made by an English court against a mortgagor who is within the jurisdiction, although the subject of the mortgage may be immovables situated abroad.⁴

Whether a personal obligation is such as to affect the defendant's conscience is a matter to be determined solely by English ^{Equitable right enforced though not recognized by *lex situs*} law. The court does not refuse to exercise its equitable jurisdiction merely because the right, recognized by English law as springing from the personal relationship between the parties, is one which is not recognized by the *lex situs*. Lord Cottenham, in the case of *Ex parte Pollard*,⁵ said:

'The courts of this country in the exercise of their jurisdiction over contracts made here or in administering equities between parties here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situated, or of the manner in which the courts of such countries might deal with such equities.'

¹ *Kildare v. Eustace* (1686), 2 Cas. in Ch. 188.

² *Ewing v. Orr-Ewing* (1883), L.R. 9 A.C. 34.

³ *Beckford v. Kemble* (1822), 1 Sim. & St. 7.

⁴ *Toller v. Carteret* (1705), 2 Vern. 494; *Paget v. Eds*, [1874] L.R. 18 Eq.

118.

⁵ (1840), Mont. & Ch. 239; *In re Anchor Line*, [1937] 1 Ch. 483, 488.

In that case, an equitable mortgage according to English law had been created over Scottish land by the deposit of title-deeds, together with a memorandum by which the mortgagors agreed to do anything necessary to make the security more effective. The mortgagors, who were partners carrying on business in Scotland and England, became bankrupt, and the mortgagee claimed in the English court to have his debt paid out of the Scottish land in preference to the general body of creditors. The objection raised to this claim was that by the law of Scotland no lien or equitable mortgage on the land was created by the deposit of the title-deeds or by the written memorandum. The court decided in favour of the plaintiff. There was nothing in Scottish law which made it illegal or impossible for the mortgagors to create an effective mortgage according to the terms of their contract, and the fact that what they had done did not create a right *in rem* according to the *lex situs* was no reason why the English court should not enforce the personal obligation by decreeing the execution of an instrument in the proper Scottish form.

✓ Performance of English decree must be possible in the *situs*

The doctrine of *Penn v. Baltimore*, however, is subject to two limitations.

First, it must be possible for the decree issued by the English court to be carried into effect in the country where the land is situated.¹

This restriction requires no elaboration, for the futility of ordering the defendant to perform some act which would be forbidden by the *lex situs* is obvious. As Lord Cottenham said in *Ex parte Pollard*:² 'If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act.'

Must be privity of obligation between the parties

Secondly, the personal obligation which is the basis of the English court's jurisdiction must, to use an expression of Beale, 'have run from the plaintiff to the defendant',³ i.e. there must be privity of obligation between the parties to the action.

It is firmly established that the court acts only against the actual person who, as a result of his *own* conduct, is under a personal obligation to the plaintiff, and it stops short of exercising the jurisdiction against a third party, even though he may have acquired the land from one who is contractually, or other-

¹ *Waterhouse v. Stansfield* (1851), 9 Hare 234.

² (1840), Mont. & Ch. 239.

³ 20 H.L.R. 390.

wise personally, liable to the plaintiff.¹ There must be privity of obligation between plaintiff and defendant, and that privity must arise from some transaction effected by the plaintiff with the defendant. If *A* agrees to sell foreign land to *B*, there is no doubt that *A* incurs a personal liability which is justiciable in England. But if, in breach of his contract, *A* sells the land to *X*, there is no personal equity which *B* can enforce against *X*. There is no contract by *X* with *B*, no unconscionable conduct by *X* towards *B* personally. What is involved in such a case is a claim of title to foreign land advanced by two contesting parties who are strangers to each other so far as mutual dealings are concerned. Such a question of title is, of course, determinable exclusively by the *lex situs* and is subject exclusively to the jurisdiction of the courts at the *situs*. 'I need not dwell', said Kay J. in a leading case, 'upon the danger of error if the courts of this country were to entertain jurisdiction to determine a contested claim of this kind depending upon questions of foreign law'.²

An apt illustration is *Norris v. Chambres*.³ In that case Sadleir agreed to buy certain Prussian lands from Simons and paid a deposit. Simons refused to complete and sold the land to Chambres, who had notice of Sadleir's contract. Sadleir's representative brought a suit in England claiming that he was entitled to a lien on the land. Sir John Romilly M.R., in dismissing this claim, referred to the cases which had followed *Penn v. Baltimore*, and said:⁴

Norris v. Chambres (U)

'On examining them, I find that in all of them a privity existed between the plaintiff and defendant; they had entered into some contract, or some personal obligation had been incurred moving directly from the one to the other. In this case I cannot find that anything of that sort exists.'

Later he said:

'Simons having received this money repudiates the contract, and sells the estate to a stranger. That constitutes no personal demand which Sadleir could enforce in this country against that stranger. There is no contract between them, there are no mutual rights, and there is no

¹ *Martin v. Martin* (1831), 2 R. & M. 507; *Waterhouse v. Stansfield* (1851), 9 Hare. 234; *Norris v. Chambres* (1861), 29 Beav. 246; affirmed (1861), 3 De G.F. & J. 583; *Hicks v. Powell* (1869), L.R. 4 Ch. 741; *Norton v. Florence Land Co.* (1877), 7 Ch.D. 332.

² *In re Hawthorne* (1883), 23 Ch.D. 743, 747.

³ (1861), 29 Beav. 246; (1861); 3 De G.F. & J. 583.

⁴ 29 Beav. at pp. 254-5.

obligation moving directly from one to the other. I am told that . . . according to the law of England, if a man sell an estate to *B*, and receive part of the purchase money, and then repudiate the contract and sell the estate to *C*, who has notice of the first contract and of the payment of part of the purchase money by *B*, *B* shall, in that case, have a lien on the estate in the hands of *C* for the money paid to the original owner. But assume this to be so, this is purely a *lex loci* which attaches to persons resident here and dealing with land in England. If this be not the law of Prussia, I cannot make it so because two out of the three parties dealing with the estate are Englishmen, and I have no evidence before me that this is the Prussian law on the subject, and if it be so, the Prussian courts of justice are the proper tribunals to enforce these rights.'

(ii) ✓ This decision was followed in Deschamps v. Miller,¹ where the facts were these:

Facts:- *H* and *W* married each other in France where they were domiciled. *H* later settled in India and, having gone through a ceremony of marriage with *X* during the lifetime of *W*, made a settlement, of which the defendants were trustees, of land in Madras in favour of *X*, and certain other persons. After the death of *H* and *W*, the plaintiff, who was their only son and the administrator of *W*'s English property, sued the defendants to impeach the settlement, his contention being that by French law *W* became entitled to one-half of the after-acquired property of *H* and to a life interest in the other half.

The plaintiff failed in his action, since there was no possible ground upon which a personal remedy against the defendants could be based. The issue was whether Indian law admitted that the wife acquired an interest in the land by virtue of her marriage in France and, if so, whether she could have followed the land into the hands of the defendants. These were matters that fell within the exclusive jurisdiction of the Indian tribunals.

There may, of course, be exceptional circumstances in which an equity which has arisen between *A* and *B* can be enforced against *C* under the doctrine of *Penn v. Baltimore*. It is always a question of personal obligation. Is the defendant, though not a party to the original transaction which gave rise to the dispute, contractually or otherwise personally bound? Thus in Mercantile Investment and General Trust Company v. River Plate Trust, Loan and Agency Co.:²

Third parties affected if subject to personal obligation

(iii) ✓ Facts:- An American company created an equitable charge over land in Mexico in favour of certain English debenture-holders. The charge was void by Mexican law for want of registration. The land was later

¹ [1908] 1 Ch. 856; Morris, *Cases on Private International Law*, p. 305.

² [1892] 2 Ch. 303.

transferred to the defendants, an English company, but '*subject to the mortgage, lien or charge now existing*' in favour of the debenture-holders.

To an action brought in England to enforce this equitable charge it was objected that there was no privity of obligation between the debenture-holders of the American company and the defendants. The defendants had not issued the debentures, and, by Mexican law, they were the absolute and unfettered owners of the land. North J. had no difficulty in disposing of this argument. The defendants had agreed to take the land subject to an express obligation in favour of the debenture-holders, and it was clearly unconscionable that they should rely exclusively upon the *lex situs*.

Such, then, is the doctrine that the English court invokes to justify an order which, though personal in form, may affect the title to foreign land. It is a doctrine that in some cases has undoubtedly been carried to an extent scarcely warranted by the principles of international law,¹ as, for instance, where an Englishman resident in Chile was ordered to carry out a contract concerning land, binding according to English law, which the Chilean courts had held not to be binding.² There is, indeed, an obvious danger of injustice if, to take one example, the strict rules which English law applies to dealings with trust property are applied to a dispute between foreigners who, according to the *lex situs*, are not exactly related to each other as trustee and beneficiary.³ In fact, Lord Esher once went so far as to say that the decision in *Penn v. Baltimore*, 'which has been acted upon by other great judges in equity, seems to me to be open to the strong objection that the court is doing indirectly what it dare not do directly'.⁴

Dangers
inherent
in *Penn v.*
Baltimore

An interesting question which has never arisen in England is whether a foreign judgment based upon the same principle as that adopted in *Penn v. Baltimore*, but affecting English land, will be granted extra-territorial effect. If, for instance, a Californian court decrees that *X*, resident in California, shall reconvey English land to *Y*, from whom he has obtained it by fraud, will the English court, at the suit of *Y*, compel *X* to carry the

The con-
verse of
Penn v.
Baltimore

¹ Story, op. cit. (8th ed.), p. 758.

² *Cood v. Cood* (1863), 33 Beav. 314.

³ See the remarks of Lord Macnaghten in *Concha v. Concha*, [1892] A.C. 670, 675. See also Baty, *Polarized Law*, pp. 86-87.

⁴ *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q.B. 358, 404-5.

1953' decree into effect? Comity, if it means anything, would dictate an affirmative answer. It is arguable that if it is right for an English court to order a person within the jurisdiction to effect a certain disposition of land abroad, it is wrong to deny an equivalent power to a foreign court. Moreover, as such cases as Travers v. Holley¹ show, this spirit of reciprocity is not lacking in other contexts and few would disagree in general with the observation of Hodson L.J. in that case that:

'It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.'²

However, any attempt by a foreign court to regulate the disposition of land outside its jurisdiction not unnaturally provokes a certain animosity in the *forum rei sitae* and it is doubtful whether in this particular context the English judges would be imbued with any spirit of reciprocity. The Supreme Court of Canada, indeed, has satisfied itself that English courts do not regard their own decrees *in personam* affecting land abroad as having any extra-territorial effect, and that therefore no recognition will be granted to similar decrees of foreign courts.³

¹ [1953] P. 246; *supra*, p. 397.

² *Ibid.*, at p. 256.

³ *Duke v. Andler*, [1932] S.C.R. 734; and see an article by D. M. Gordon, 49 L.Q.R. 547, on this case where he also cites two decisions in the U.S.A. to the same effect.

PART VI

FOREIGN JUDGMENTS

CHAPTER XVII

FOREIGN JUDGMENTS

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I. PRINCIPLE OF RECOGNITION

UNSATISFIED foreign judgments give rise to complicated questions of private international law. If a plaintiff fails to obtain satisfaction of a judgment in the country where it has been granted, the question arises whether it is enforceable in another country where the defendant is found. It is clear at the outset that owing to the principle of territorial sovereignty a judgment delivered in one country cannot, in the absence of international agreement,¹ have a direct operation of its own force in another. Levy of execution, for instance, cannot issue in England in respect of a judgment delivered in France.² Nevertheless, the Anglo-Saxon systems of

Foreign judgments have no direct effect in England

¹ See, for example, the convention concluded between the United Kingdom and Federal Germany, Cmd. 1118.

² French courts, applying articles 14 and 15 of the Civil Code, go so far as to

law have long permitted the enforcement of a foreign judgment within certain defined limits, since otherwise one of the essential objects of private international law, the protection of rights acquired under a foreign system of law, would not be fully attained.¹

The attitude adopted by English law from the earliest days has been to permit the successful suitor to bring an action in England on the foreign judgment. But in the last hundred years the courts have changed their view as to the ground upon which this privilege is based. The older cases put it solely upon the ground of comity.² This vague principle would appear to mean that, in order to obtain reciprocal treatment from the courts of other countries, we are compelled to take foreign judgments as they stand and to give them full faith and credit. Thus in 1798 Ashhurst J., speaking of certain judgments given by the French courts, used the following language:

‘Those courts had competent jurisdiction over the subject-matter; and it is an established rule that the judgment of a foreign court . . . is conclusive if the same question arise again here. Now as the French courts have already given a judicial opinion upon this question, it must

withhold all recognition of any foreign judgment which involves a Frenchman; 8 I. & C.L.Q. 25 (J. K. Grodecki.)

¹ Bar. 895. As we shall see, English law permits an action to be brought, subject to certain conditions, for the recovery of a sum of money adjudged to be due by a foreign court of competent jurisdiction. This is very different from the practice obtaining on the Continent. In France, for instance, the position has been described as follows by a learned writer: ‘In France, when proceedings are brought for the enforcement of a foreign judgment, the French courts first satisfy themselves that the foreign judgment fulfils certain conditions (conditions which, though not the same, are fairly similar to those required by an English court when an action on the judgment is brought). If the foreign judgment is found to satisfy these conditions, then an *exequatur* is granted, if there is a convention to this effect with the country from which the judgment issues. In the absence of such convention, however (except in judgments relating to matters of personal status), the French courts have the right, which they apparently almost invariably exercise, of revision, which means that the case is re-opened on its merits and the proceedings are, so far as delay and expense are concerned, equivalent to a retrial of the case *de novo*. The foreign judgment is not regarded as final, but merely as a *titre* or instrument on the basis of which certain conservatory measures can be taken (viz. the preservation of assets in the hands of the judgment debtor)’, 10 B.Y.B.I.L. (1929), 225. No conventions have been made by England. Hence the importance of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, *infra*, pp. 635–8, under which, it is to be hoped, mutual arrangements with foreign countries for the enforcement of judgments will be made. As to the *exequatur* provisions in the new draft code of French law see 29 *Canadian Bar Review*, 744–6.

² See Piggott, *Foreign Judgments*, part i, pp. 10 et seqq.

govern us whatever may be our opinions concerning the real merits of the case.¹

In other words, a foreign judgment must as a general rule be taken at its face value.

To base enforcement upon this uncertain ground quickly leads to difficulties. One result is that the question of reciprocity becomes relevant, for enforcement must be withheld if the judgment emanates from a country which refuses to grant a similar measure of credit to the judgments of English courts.² Thus in the American case of *Hilton v. Guyot*,³ the Supreme Court once held by a majority of five to four that conclusive effect could not be given to the judgments of French courts, since French law refused to recognize the authority of foreign judgments. Another objection to the theory of comity is the impossibility of determining with precision the defences available to the defendant.⁴ If the English court is *compelled* by comity to enforce the judgment, logic would seem to exclude all defences, except the want of jurisdiction in the foreign court; but to carry enforcement to these lengths is obviously inconsistent with the most elementary notion of natural justice.

Inadequacy
of the
principle
of comity

It is unnecessary, however, to consider the theory of comity further, for it has been supplanted by a far more defensible principle which has been called 'the doctrine of obligation'.⁵ This doctrine, which was laid down in 1842, is that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in this country by an action of debt.⁶ Once the judgment is proved the burden lies upon the defendant to show why he should not perform the obligation.

The
modern
doctrine of
obligation

'The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which

¹ *Geyer v. Aguilar* (1798), 7 T.R. 681, 697.

² See *per* Blackburn J. in *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 159.

³ 159 U.S. 113 (1895); Lorenzen, p. 180; Beale, ii. 631. This decision is binding, if at all, only upon the lower federal courts, Goodrich, *op. cit.*, p. 607. Most State courts refuse to follow it; Kahn-Freund, *The Growth of Internationalism in Private International Law*, pp. 19-20.

⁴ Piggott, *Foreign Judgments*, part i, p. 11.

⁵ *Ibid.*, pp. 10 et seqq.

⁶ *Russell v. Smyth* (1842), 9 M. & W. 810, at p. 819, *per* Parke B.; *Williams v. Jones* (1845), 13 M. & W. 628; *Godard v. Gray* (1870), L.R. 6 Q.B. 139, at p. 148, *per* Blackburn J.

judgment is given, which the courts in this country are bound to enforce.¹

In other words, a new right has been vested in the creditor and a new obligation imposed upon the debtor at the instance of the foreign court.² Lord Esher once said that 'the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment'.³ This does not mean that the justification for the enforcement of the obligation is an implied contract, but that for procedural purposes the debtor is regarded as having implicitly promised to pay.⁴ Historically this is well founded, for according to the doctrine of *Slade's Case* the mere existence of the debt raises an implied promise to pay the amount due. The creditor sues for the recovery of a simple contract debt, and since this is a liquidated amount he may proceed by way of a specially endorsed writ.⁵

Merits of the doctrine of obligation ✓ The merits of this doctrine, as compared with the principle of comity, are twofold. In the first place the question of reciprocity is eliminated. If *A* is under a legal obligation to *B*, there is no more need to consider what treatment is meted out by the foreign courts in question to English judgments than there would be to examine the private international law, say, of France, where the obligation resulted from a contract made in France. An obligation, once recognized by English law, must be enforced irrespective of the substantive rules of law obtaining in the country of its creation. In the second place, there is little difficulty in prescribing the defences available to the defendant, for if the ground of his liability is an obligation, then any fact which disproves the existence of an obligation may be pleaded in bar.

No merger of cause of action in foreign judgment It is a rule of domestic English law that a plaintiff who has obtained judgment in England against a defendant is barred from suing again on the original cause of action. The original cause of action is merged in the judgment—*transit in rem judicatam*—and it would be vexatious to subject the defendant to another action for the purpose of obtaining the same result.⁶

¹ *Schibsby v. Westernholz* (1870), L.R. 6 Q.B. 155, 159, per Blackburn J.

² *Grant v. Easton* (1883), L.R. 13 Q.B.D. 302, 303.

³ For the basis upon which foreign judgments are recognized in England see Read, *Recognition and Enforcement of Foreign Judgments*, pp. 52 et seqq.

⁴ Read, op. cit., pp. 112-13.

⁵ *Grant v. Easton* (1883), 13 Q.B.D. 302; i.e. under O. 3 R. 6 of the R.S.C. Many foreign judgments are enforced by way of summary proceedings under O. 14.

⁶ *King v. Hoare* (1844), 13 M. & W. 494, 504.

It has been held, however, in a series of authorities, that this is not so in the case of foreign judgments.¹ Such a judgment does not, in the view of English law, occasion a merger of the original cause of action, and therefore the plaintiff has his option, either to resort to the original ground of action or to sue on the judgment recovered,² provided, of course, that the judgment has not been satisfied.³ There is little justification for thus differentiating between English and foreign judgments.⁴ The reasons upon which the doctrine is founded are obscure and evasive, and the principal consideration that would appear to have influenced the courts, namely, that a foreign judgment is only evidence of the debt due from the defendant,⁵ was forcibly demolished by the majority of the court in the later case of *Godard v. Gray*.⁶ The most plausible justification for non-merger, perhaps, is that a plaintiff suing in England on a foreign as distinct from a domestic judgment possesses no higher remedy than he possessed before the foreign action. The effect of judgment in English proceedings is that 'the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher';⁷ but the view which English law takes of a foreign judgment is that it creates merely a simple contract debt between the parties. The doctrine of non-merger has, however, been too often repeated by judges to justify any prospect of its abandonment.

A foreign arbitral award is on the same footing as a foreign judgment in the sense that an action to recover the sum awarded may be brought in England. The essentials of success are proof that the parties submitted to arbitration, that the arbitration was conducted in accordance with the submission, and that the award is valid by the law of the country in which it has been made.⁸

Foreign
arbitral
awards

¹ *Hall v. Odber* (1809), 11 East 118; *Smith v. Nicolls* (1839), 5 Bing. (N.C.) 208; *Bank of Australasia v. Harding* (1850), 9 C.B. 661; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717.

² *Per Tindal C.J.*, *Smith v. Nicolls*, *supra*, at p. 221.

³ *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95.

⁴ See Piggott, *Foreign Judgments*, part i, p. 15; Read, *Recognition and Enforcement of Foreign Judgments*, pp. 116-21.

⁵ See, for example, *Hall v. Odber*, *supra*, *per Bayley J.*

⁶ (1870), L.R. 6 Q.B. 139, 149-50.

⁷ *King v. Hoare* (1844), 13 M. & W. 494, 504, *per Parke B.*

⁸ *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927), 43 T.L.R. 541. This right of action is not affected by the statutory right to enforce certain foreign arbitral awards; Arbitration Act, 1950, s. 40 (a); *infra*, pp. 638-40.

II. DIRECT ENFORCEMENT OF FOREIGN JUDGMENTS IN ENGLAND

Exceptions
to rule that
foreign
judgment
not directly
enforceable
in England

The common law doctrine that a foreign judgment, though creating an obligation that is actionable in England, cannot be enforced here except by the institution of fresh legal proceedings, is subject to important statutory exceptions introduced by the Judgments Extension Act, 1868; the Administration of Justice Act, 1920, Part II; and the Foreign Judgments (Reciprocal Enforcement) Act, 1933.¹ We will deal with these statutes separately.

I. JUDGMENTS EXTENSION ACT, 1868

Exceptional
position of
Scottish
and Irish
judgments

Scotland and Ireland, from the point of view of private international law, are foreign countries, and before 1868 a plaintiff who had obtained judgment in either of these countries and who desired to enforce it against the defendant in England was in no better position than if he had obtained his judgment in some country which did not form part of the United Kingdom. His only course was to bring a fresh action in England. The Act of 1868 was therefore passed with the object of rendering judgments obtained in the Superior Courts of England, Scotland and Ireland, respectively, effectual in any other part of the United Kingdom.

Irish or
Scottish
judgment
has full
effect in
England

The Act now applies only to judgments obtained in the English High Court of Justice, the High Court of Justice in Northern Ireland² and the Court of Session in Scotland. Each of these courts keeps a register, in which a certificate affirming that a judgment has been obtained in either of the other two countries may be entered. A judgment is 'extended' by registering in the country where enforcement is desired a certificate issued by the adjudicating court. The Act provides that:

"[The certificate] shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate, as if the judgment of which it is a certificate had been a judgment originally obtained . . . in the court in which it is so registered, and all the reasonable costs and charges attendant upon

¹ See an article by Professor H. E. Yntema, 33 *Michigan Law Review* (June 1935), pp. 1129 et seqq.

² After Eire became a Dominion it was held that judgments by its courts could no longer be registered in England under the Act of 1868; *Wakely v. Triumph Cycle Co.*, [1924] 1 K.B. 214; *Banfield v. Chester* (1925), 94 L.J., K.B. 805; but for the contrary view taken in Eire see *Gieves Ltd. v. O'Connor*, [1924] 2 Ir.R. 182. Eire is now a Republic.

the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment.¹

The effect of the Act is restricted in this sense, that the only type of judgment of which a certificate may be registered is one for 'any debt, damages or costs'.² The judgment which it is sought to extend must be one which decrees the payment of a sum of money. Thus judgments in probate and divorce suits or for the recovery of land, and decrees of courts of Equity, are outside the statutory provisions.³

The Act also restricted the power of the English court over an extended judgment to its execution,⁴ with the result that its extension did not enable the creditor either to obtain a judgment summons⁵ or to start bankruptcy proceedings⁶ against the debtor. These two restrictions, however, have now been abolished.⁷

An Irish or a Scottish judgment which has been extended to England cannot be impeached upon its merits in an English court. The sole course open to a defendant who desires to challenge the validity of the original judgment is to take the appropriate proceedings in the country where the judgment was given.⁸

The statute is confined to the superior courts of the three countries, but the Inferior Courts Judgments Extension Act, 1882,⁹ has made the same procedure applicable to the judgments of inferior courts, such as the County Court in England or the Sheriff's Court in Scotland.

Other statutes provide for the reciprocal enforcement of orders made in bankruptcy¹⁰ and in the course of winding up a company.¹¹

2. ADMINISTRATION OF JUSTICE ACT, 1920¹²

This Act, which was passed upon the recommendation of the Imperial Conference of 1911, makes provision for the

¹ S. 1. Unless the registration is effected within twelve months after the judgment, leave must be obtained from the court in which registration is sought.

² S. 1.

³ *Wotherspoon v. Connolly* (1871), 9 Macph. (Ct. of Sess.) 510, 513, per Lord President Inglis.

⁴ Including equitable execution by the appointment of a receiver, *Thompson v. Gill*, [1903] 1 K.B. 760. S. 4.

⁵ *In re Watson*, [1893] 1 Q.B. 21.

⁶ *In re a Bankruptcy Notice*, [1898] 1 Q.B. 383.

⁷ Administration of Justice Act, 1956, s. 40 (a).

⁸ See *Bailey v. Welpley* (1869), Ir.R. 4 C.L. 243.

⁹ 45 & 46 Vict., c. 31.

¹⁰ Bankruptcy Act, 1914, s. 121.

¹¹ Companies Act, 1948, s. 276.

¹² 10 & 11 Geo. V, c. 81.

enforcement within the United Kingdom of judgments obtained in a superior court of any part of the British dominions, including any territory which is under Her Majesty's protection or mandate.¹

Registration of Common-wealth judgments in England A person who has obtained a judgment in one of these countries or territories may within twelve months apply for registration to the High Court in England or Ireland or to the Court of Session in Scotland, whereupon the court may, *if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom*, order the judgment to be registered.² Thus, registration is not a right, as it is under the Judgments Extension Act, 1868, but lies wholly within the discretion of the court.

When registration not allowed A judgment cannot be registered unless it is one under which a sum of money is made payable.³ Nor is registration allowed if:

- (a) the original court acted without jurisdiction;
- (b) the judgment debtor did not voluntarily submit to the jurisdiction of the adjudicating court, unless he was carrying on business or was ordinarily resident within that jurisdiction;
- (c) the judgment debtor was not served and did not appear in the original proceedings;
- (d) the judgment was obtained by fraud;
- (e) an appeal is pending;
- (f) the original cause of action was one which, for reasons of public policy or for some other similar reason, could not have been entertained in England.⁴

Effect of registration A judgment registered under the Act is of the same force and effect, and it may be followed by the same proceedings, as if it had originally been obtained in the registering court.⁵ A plaintiff is in no way deprived of his right to sue at common law upon the obligation created by a foreign judgment,⁶ but if he sues on a judgment that is registrable under the Act he is not entitled to the costs of the action unless registration has been refused or unless the court otherwise orders.⁷

Reciprocal arrangements must be made for registration of English judgments The Act, however, does not render a judgment registrable within the United Kingdom unless its provisions have been extended by Order in Council to the country in which the

¹ S. 13.

² S. 9 (1).

³ S. 12.

⁴ S. 9 (2).

⁵ S. 9 (3) (a), (b); as amended by Administration of Justice Act, 1956, s. 40 (b).

⁶ *Yukon Consolidated Gold Corporation v. Clark*, [1938] 2 K.B. 241, 252.

⁷ S. 9 (5).

judgment has been obtained. Reciprocity is essential. When reciprocal provisions have been made by a colony for the enforcement of English, Scottish and Irish judgments, an Order in Council may be made extending the Act to the colony in question.¹ The Act has already been extended to a large number of Dominions, colonies and mandated territories, including Jamaica, Kenya, the Federated Malay States, New Zealand, New South Wales, Queensland, South Australia, Western Australia, Victoria and Tasmania.²

3. FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933³

The policy of facilitating the direct enforcement of foreign judgments in England has received a further impulse from the Foreign Judgments (Reciprocal Enforcement) Act, 1933, which applies the principle of registration, not only to Her Majesty's dominions, but also to foreign countries. In the words of Greer L.J.:

Judgments
in countries
outside
British
Empire
registrable,
subject to
reciprocal
treatment

'It was fully appreciated by those who thought about foreign judgments, that British judgments were never enforced as of right in foreign countries, and that was believed, and rightly believed, to operate as an injustice to this country. Whereas we enforced foreign judgments by means of action in this country, foreign countries refused to enforce the judgments obtained in this country, and it was to deal with that situation that the Act of 1933 was passed, but incidentally it also dealt with Dominion judgments.'⁴

The provisions made by the Act for the registration of foreign judgments in England may be extended by Order in Council to any country which is prepared to afford substantial reciprocity of treatment to judgments obtained in the United Kingdom.⁵ It is undesirable that there should be two systems of registration, one for the British Commonwealth, the other for countries outside the Commonwealth, and therefore a policy of the gradual supersession of the 1920 Act has been adopted. With this object in view power is given to render the 1933 Act applicable by Order in Council to British dominions, protectorates and mandated territories, and it is provided that the

¹ S. 14.

² For a complete list see the Statutory Rules and Orders from 1922 onwards.

³ 23 Geo. V, c. 13.

⁴ *Yukon Consolidated Gold Corporation v. Clark*, [1938] 2 K.B. 241, 253. See S.R. & O. (1933), No. 1073.

⁵ S. 1.

Administration of Justice Act, 1920, shall cease to apply to any part of Her Majesty's dominions in relation to which such an Order has been made.¹ Orders to this effect have been made for Pakistan,² India³ and the Australian Capital Territory.⁴

French and Belgian judgments now registrable Two conventions made in 1934 have extended the provisions of the Act to French and Belgian judgments.⁵ These provide that judgments of the superior courts in civil and commercial matters shall be mutually recognized and enforced, notwithstanding that the adjudicating court followed rules for the choice of law different from those that would have been followed in the country where enforcement is sought.

Pre-requisites of registration The successful party to proceedings in a foreign country to which the Act has been extended may apply to the High Court at any time within six years⁶ for registration of the judgment in England, provided that the judgment was delivered by a superior court in the foreign country, and provided that it finally and conclusively adjudged a sum of money to be payable to the applicant, other than a sum in respect of taxes or in respect of a fine or other penalty.⁷ A judgment, however, is to be deemed final and conclusive, notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the foreign courts.⁸ The Act differs from the earlier Act of 1920 in that no discretion is left to the High Court. It is expressly provided that:

'On any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered.'⁹

Setting aside of registration There are, however, certain circumstances in which, on the application of the party against whom the registered judgment is enforceable, the registration *must* be set aside and other circumstances in which it *may* be set aside.

¹ S. 7.

³ S. 9 (1958), No. 425.

⁵ S.R. & O. (1936), No. 609 (France); No. 1169 (Belgium). For more details see 3 *J. & C.L.Q.* 90-92.

⁶ S. 2.

² S. 9 (1958), No. 141.

⁴ S. 9 (1955), No. 559.

⁷ S. 1 (1), (2).

⁸ S. 1 (3). But it is provided by s. 5 (1) that on an application to set aside registration the court may do so or may adjourn the application if satisfied that an appeal is pending or that the defendant is entitled and intends to appeal; see, for an example where such an application was refused, *In re A Debtor* (No. 11 of 1939), [1939] 2 All E.R. 400. Under the Act of 1920 the fact that an appeal is pending is a bar to registration, *supra*, p. 634.

⁹ S. 2.

Registration *must* be set aside:

- (i) if the judgment is not one to which the Act applies;
- (ii) if the foreign court acted without jurisdiction;
- (iii) if the judgment debtor, being the defendant in the original proceedings, did not (despite service of process in accordance with the foreign law) receive notice of the proceedings in sufficient time to enable him to defend them and did not appear;
- (iv) if the judgment was obtained by fraud;¹
- (v) if the enforcement of the judgment would be contrary to public policy in England;
- (vi) if the rights under the judgment are not vested in the applicant.²

When
registration
must be set
aside

Registration *may* be set aside if the registering court is satisfied that the matter adjudicated upon had already been the subject of a final and conclusive judgment by a court having jurisdiction in that matter.³

When
registration
may be set
aside

The rules by which the Act specifies the circumstances in which a foreign court shall be deemed to have had jurisdiction vary according as the original action was *in personam* or *in rem*.

Cases in
which
foreign
court

In the case of a judgment given in an action *in personam* the original court is deemed to have had jurisdiction in the following circumstances:

deemed to
have juris-
diction

- (i) If the judgment debtor, being defendant in the original court, submitted to the jurisdiction by voluntarily appearing in the proceedings otherwise than for the purpose of contesting the jurisdiction or of protecting, or obtaining the release of, property seized or threatened with seizure, in the proceedings.
- (ii) If the judgment debtor was plaintiff in the original action.
- (iii) If the judgment debtor, being defendant, had previously agreed to submit to the jurisdiction.
- (iv) If the judgment debtor, being defendant, was, at the time of the institution of the proceedings, resident in the foreign country, or, being a corporation, had its principal place of business in that country.
- (v) If the judgment debtor, being defendant, had an office or place of business in the foreign country and the original action was brought in respect of a transaction effected through or at that office or place.⁴

Jurisdic-
tion over
action *in
personam*

It is expressly enacted that the expression 'action *in personam*' shall not include any matrimonial cause, or any proceedings

¹ When an application is made on this ground, the same rules apply as apply where the defence of fraud is raised to an action on a foreign judgment (*infra*, p. 672), *Syal v. Heyward*, [1948] 2 K.B. 443.

² S. 4 (1) (a).

³ S. 4 (1) (b).

⁴ S. 4 (2) (a).

connected with matrimonial matters, the administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or the guardianship of infants.¹

Jurisdiction over action *in rem* The original court is deemed to have had jurisdiction over an action *in rem* if the subject-matter of the action, whether movable or immovable, was situated in the foreign country at the time of the proceedings.²

Effect of registration A judgment registered under the Act is, for the purposes of execution, of the same force and effect and subject to the same control as if it had originally been given in the registering court.³

Judgment capable of registration unenforceable by action An innovation of outstanding importance is the enactment that:

‘No proceedings for the payment of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.’⁴

This clearly means that no action can be brought on a judgment that is registrable, but does it also prevent the plaintiff from suing on the original cause of action? Since the section speaks only of the sum payable ‘under a foreign judgment’, it presumably does not affect the recovery of the sum payable under the original contract or other transaction. If this is the true position, it is unfortunate.⁵

4. ARBITRAL AWARDS

Arbitration Act, 1950 Provision is made for the enforcement of foreign arbitral awards by the Arbitration Act, 1950, which consolidates the Arbitration Acts, 1889 to 1934. The background of this provision is afforded by a protocol of 1923 and a convention of 1927 both of which were signed by Great Britain at Geneva. The former deals with the international validity of arbitration agreements, the latter with the enforcement in one country of arbitral awards made in another.

Geneva protocol, 1923 The protocol, which forms the First Schedule of the Act of 1950, provides that an agreement to submit contractual disputes to arbitration, made by parties who are subject to the jurisdiction of different signatory States, shall be recognized as valid in every signatory State, even though the arbitration is to take place in a country to whose jurisdiction none of the parties

¹ S. 11 (2).

⁴ S. 6.

² S. 4 (2) (b).

⁵ See Dicey, p. 1051.

³ S. 2 (2).

is subject.¹ If one of the parties commences legal proceedings, instead of proceeding to arbitration, the court, on the application of the other party, must stay the proceedings, unless satisfied that the agreement for arbitration has become inoperative and cannot proceed or that there is not in fact any dispute falling within the scope of the arbitration agreement.²

In order to implement the convention of 1927, the Act next provides that a foreign award, as therein defined, shall be enforceable in England either by action or, with the leave of the High Court, in the same manner as a judgment is enforced.³ Further, the award is to be treated as binding for all purposes on the persons between whom it was made, who are to be entitled to rely upon it by way of defence, set-off or otherwise in any legal proceedings in England.⁴

Certain
foreign
awards
enforceable
in England

A 'foreign award' means one which is

- (i) made in pursuance of an agreement for arbitration which is valid according to the law by which it is governed, *and*
- (ii) made between persons subject to the jurisdiction of signatory States to the 1927 Convention, *and*
- (iii) made in a territory to which the convention has been extended by Order in Council.⁵

An award, however, is not to be enforceable unless it satisfies certain conditions. It must have

Conditions
of enforce-
ability

- (a) been made in pursuance of an agreement for arbitration valid by the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement;
- (c) been made in conformity with the procedural rules obtaining in the country where the arbitration was held;
- (d) become final in the country in which it was made;⁶
- (e) been in respect of a matter which may lawfully be referred to arbitration under English law;

and its enforcement must not be contrary to the public policy or the law of England.⁷

An award is not deemed final if proceedings for testing its validity are pending in the country in which it was made.⁸ Moreover, an award is not to be enforceable if it does not deal

¹ Arbitration Act, 1950, First Schedule, para. 1.

² Arbitration Act, 1950, s. 4 (2).

³ Ibid. s. 36 (1).

⁴ Ibid. s. 36 (2).

⁵ Ibid. s. 35. It has been extended to some fifty territories.

⁶ *Union Nationale des Co-operatives Agricoles de Cereales v. Robert Catterall & Co. Ltd.*, [1959] 2 Q.B. 44.

⁷ Arbitration Act, 1950, s. 37 (1).

⁸ Ibid. s. 39.

with all the questions referred to the arbitration or exceeds the scope of the arbitration agreement, or if the party against whom enforcement is sought was not given sufficient notice of the arbitration proceedings or was under some legal incapacity and was not properly represented.¹

III. ACTIONABILITY OF FOREIGN JUDGMENTS

We must now leave the exceptional cases in which statutes have enabled foreign judgments to be made directly effective in England, and must consider the principles upon which the successful litigant may take advantage of a foreign judgment to which no statute is applicable. A foreign judgment creditor has an alternative. He may either sue upon the obligation created by the judgment, or he may plead the judgment as *res judicata* in any proceedings which raise the same issue. It is to this extent that a foreign judgment may be described as effective in England. We must first consider the general requirements upon which this effectiveness depends.

I. PREREQUISITES OF ACTIONABILITY

A. Competence of the foreign court²

Foreign
court must
have had
jurisdiction
over the
defendant

The first and overriding essential for the effectiveness of a foreign judgment in England is that the adjudicating court should have had jurisdiction in the international sense over the defendant. A foreign court may give a judgment which, according to the system of law under which it sits, is conclusively binding upon the defendant, but unless the circumstances are such as in the eyes of English law justify the court in having assumed such jurisdiction, the judgment does not create a cause of action that is actionable in England. In Sirdar Gurdial Singh v. The Rajah of Faridkote,³ for instance:

1894.

Facts.

The Rajah obtained two *ex parte* judgments in two actions brought by him against the appellant for sums amounting to over 76,000 rupees. The appellant, who had been treasurer to the Rajah, left Faridkote five years before these actions and did not return there again. An action founded on the judgments was later brought against the appellant in the court at Lahore, where he was then resident. This action was therefore on a foreign judgment, since Faridkote was a native State with independent jurisdiction.

¹ Arbitration Act, 1950, s. 37 (2).

² See 2 *I. & C.L.Q.* 510 et seqq.

³ [1894] A.C. 670.

It was held by the Privy Council that the action brought at Lahore must fail, for the Faridkote court had no jurisdiction on any recognized principle of international law against a man who had left the territory and who was the domiciled subject of another State.

The requirement is that the foreign court should have been a court of competent jurisdiction in the international sense, i.e. according to the principles of private international law as understood in England. In other words, the inquiry with which we are now concerned is whether, in the view of English law, the foreign court was entitled to summon the defendant and subject him to judgment.¹ We must now deal separately with judgments *in personam* and judgments *in rem*.

Jurisdiction in the international sense

(a) *Judgments in personam.*

Since a foreign judgment is actionable only because it imposes an obligation upon the defendant, it follows that any fact which negatives the existence of that obligation is a bar to the action. One of the negating facts must necessarily be that the defendant owes no duty to obey the command of the tribunal which has purported to create the obligation. There must be a correlation between the legal obligation of the defendant and the right of the tribunal to issue its command. The circumstances in which an English court may assume power to determine a claim *in personam* are well settled, and it is legitimate to infer that the criterion by which the competence of an English court is tested must also be adopted when the inquiry relates to the competence of a foreign court. Personal jurisdiction in this country depends upon the right of a court to summon the defendant. Apart from special powers conferred by statute² it is obvious that, since the right to summon depends upon the power to summon, jurisdiction is in general exercisable only against those persons who are present in England.³ If the defendant is absent from a country and has no place of business there, then, whether he be a citizen or an alien, he would appear to be immune from the jurisdiction, unless he has voluntarily submitted to the decision of the court.⁴ These

Suggested that it is presence or submission

¹ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790 et seqq.; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, 659.

² *Supra*, pp. 111 et seqq.

³ *Employers' Liability Assurance Corporation v. Sedgwick Collins & Co.*, [1927] A.C. 95, 114.

⁴ *Harris v. Taylor*, [1915] 2 K.B. 580, 589.

considerations would seem to show that jurisdiction depends, either upon presence in a country at the time of the suit (with which may be classed the possession of a place of business there), or upon submission. It is instructive in this connexion to notice that the Administration of Justice Act, 1920, in setting up the system of extended judgments for the British Empire,¹ provides as follows:

'No judgment shall be ordered to be registered under this section if the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.'²

The more explicit provisions of the Foreign Judgments (Enforcement) Act, 1933, as we have seen, also clearly base jurisdiction upon submission or presence.³

Tests of
jurisdiction
as
stated by
English
judges

The criterion, then, of jurisdiction in the international sense is either presence in, or voluntary submission to, the foreign jurisdiction.

(i) Presence in the foreign country at the time of the action. Jurisdiction is based upon the principle of territorial dominion. All persons who happen to be within a territorial dominion owe obedience to its sovereign power—obedience, that is to say, to the jurisdiction of its courts and in certain respects to its laws. This duty of obedience results from mere presence in the territory, and therefore the length of time for which the presence continues is immaterial.⁴ Thus in Carrick

(v) Hancock:⁴

A domiciled Englishman appeared to a writ which was served upon him in Sweden while he was on a short visit to that country. He left the country after entering an appearance and took no further part in the proceedings, which terminated in a judgment against him. It was held that despite his fleeting stay in Sweden an action on the judgment lay against him in this country.

There is, however, much to be said for the view that casual presence, as distinct from residence, is not a desirable basis of jurisdiction. Where, for instance, both parties are foreigners and the cause of action is based entirely upon facts occurring abroad and subject to foreign law, it is strange that the defendant should be bound by the decision of a court in whose

¹ *Supra*, pp. 633 et seqq.

² S. 9 (2) (b).

³ *Supra*, p. 637.

⁴ (1895), 12 T.L.R. 59; *Emanuel v. Symon*, [1908] 1 K.B. 302, 309; *Schibby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161.

1895-

Facts:-

jurisdiction he may by chance have been temporarily present. 'The court is not a convenient one for either of the parties, nor is it in a favourable position to deal intelligently either with the facts or with the law.'¹ In such a case, however, the court would have no hesitation at the instance of the defendant in staying the action as being vexatious.²

In the case of an artificial person, such as a corporation, residence for the purpose of jurisdiction exists only if, at the time of the commencement of the foreign action, substantial business is being carried on at some definite and more or less permanent place in the country of trial.³ In *Littauer Glove Corporation v. F. W. Millington Ltd.*³ Presence of corporations 1928.

Facts:—A director of the defendants, an English company having no place of business in the United States, was staying at an hotel in New York and was making occasional use of an office belonging to an important customer of the defendants. A writ was served upon him in this office in his capacity as director of the defendant company, but he entered no appearance and took no steps in the proceedings and on the following day he sailed for England. Judgment by default was given against the company by the Supreme Court of the State of New York.

It was held that an action brought in England on this judgment could not succeed. The plaintiffs argued that the defendant company was present in New York in the person of the director, but *Salter J.* held that the company was not in any true sense of the term carrying on business in that State. If it was resident at the office of the customer it must also have been resident at any place where the director happened to do business.

(ii) *Submission of defendant to the foreign court.* It is perfectly clear that if a person voluntarily and unsuccessfully submits his case as plaintiff to the decision of a foreign tribunal, he cannot afterwards, if sued upon the judgment in England, aver that he was not subject to the jurisdiction of that tribunal.⁴ (ii) Submission when defendant was plaintiff in the foreign action Contract to submit

What may be regarded as a particular example of submission arises where the defendant has previously contracted to submit

¹ 23 Ill. L.Rev. 427, cited in Read, *Recognition and Enforcement of Foreign Judgments*, p. 150.

² *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141, 152.

³ *Littauer Glove Corporation v. F. W. Millington Ltd.* (1928), 44 T.L.R. 746. The English law on the subject is undeveloped, see Read, *op. cit.*, pp. 177–86. Compare *supra*, pp. 200–1, where the analogous case of service on a foreign corporation in England is considered.

⁴ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B., at p. 161; *Novelli v. Rossi* (1831), 2 B. & Ad. 757.

1874. facts: himself to the foreign jurisdiction,¹ as, for instance, in *Feyerick v. Hubbard*,² where a domiciled British subject resident in London agreed to sell his patent rights to a Belgian, the contract of sale containing a provision that all disputes should be submitted to the jurisdiction of the Belgian courts. A less explicit agreement was held to be sufficient in *Copin v. Adamson*,³ where the facts were as follows:

A domiciled Englishman, resident in England, took shares in a French company whose articles of association provided that all disputes which might arise during liquidation should be submitted to the jurisdiction of a French court, and that process should be served at a domicile to be elected for a shareholder should he fail to elect one himself. Upon the company going into liquidation the French court gave judgment by default against the Englishman for the amount not paid up on his shares. To an action brought upon this judgment in England the defendant pleaded that he was not resident or domiciled in France before judgment, nor was he served with process, nor did he appear, nor had he any knowledge of the proceedings or opportunity to defend himself.

The plea failed. It was held that the articles constituted a contract on the part of every shareholder that he should be bound by a judgment so obtained. 'It appears to me', said Lord Cairns, 'that to all intents and purposes it is as if there had been an actual and absolute agreement by the defendant.'

Appearance as defendant in foreign action The question that remains, however, is whether appearance as defendant in the foreign action will in all cases constitute sufficient submission to the jurisdiction of the court. The test of this is whether the appearance is voluntary, for a person who is not present in the country where a court sits, but who instructs counsel to appear, cannot be said to have submitted to the jurisdiction unless his intervention in the proceedings has been free from constraint. There is obviously a case of submission where the defendant has entered an appearance, fought the action on its merits, and so taken his chance of obtaining a judgment in his own favour.⁴

¹ *Emanuel v. Symon*, *supra*; *Copin v. Adamson* (1874), L.R. 9 Ex. 345, 354.

² (1902), 71 L.J.K.B. 509. Cp. *Hart & Son Ltd. v. Furness, Withy & Co. Ltd.* (1904), 37 N.S.R. 74 (a case in Nova Scotia cited by Read, *op. cit.*, p. 171), where a bill of lading provided that 'any claim or dispute, arising on this bill of lading, shall be determined according to English law in England'.

³ (1874), L.R. 9 Ex. 345; (1875), L.R. 1 Ex.D. 17; *Vallée v. Dumergue* (1849), 4 Exch. 290.

⁴ *Molony v. Gibbons* (1810), 2 Camp. 502; *Guiard v. De Clermont*, [1914] 3 K.B. 145.

The case, however, that causes difficulty is where a defendant enters an appearance with the sole object of protesting the jurisdiction of the foreign court. If he should happen to possess property in the foreign country, the question whether such an appearance is to be regarded as voluntary is a matter of great moment. He is, indeed, faced with an awkward dilemma.

Protest
against
jurisdiction
to save
property

If he takes no part in the proceedings, a judgment obtained against him by default will be satisfied by the seizure of his foreign property, though, owing to the absence of submission, his English property will be immune. If, on the other hand, he appears in the proceedings, but only in protest of the jurisdiction, and fails, then if an appearance of such a qualified nature constitutes submission, the ultimate enforcement of the judgment may lead to the seizure of his English property. Having failed to convince the foreign court that the action should not be entertained he will have rendered liable property which, had he done nothing, would have been immune. On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot reasonably be described as voluntary, but in what may be called the property cases the older decisions have made a distinction.

If the property has already been seized by the foreign court, an appearance in protest of the jurisdiction is not voluntary. On the other hand, if the defendant has entered an appearance merely to save property that will be liable to seizure should judgment be given against him by the foreign court, his appearance is treated as voluntary.¹

This distinction is illusory, for the property, even though not seized before the trial of the action, will inevitably be seized in due process of law if the defendant remains quiescent and allows judgment to go against him by default. The argument, however, that seems to have weighed with the courts is that if he does something which he need not do, i.e. if he intervenes to save property that is in no immediate danger, he commits a voluntary act and must take the consequences. Far from being rewarded, foresight is to be penalized.

In the troublesome case of *Harris v. Taylor*,² where there was no question of property to be saved, it was this gratuitous intermeddling in proceedings that might safely have been ignored

Protest
against
jurisdiction
when no
property
to be
saved 1915-

¹ *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Voinet v. Barrett* (1885), 55 L.J. Q.B. 39, 41, when the Court of Appeal differed from the view of Wills J. in the court below, 54 L.J. Q.B. 521; *Guiard v. De Clermont*, [1914] 3 K.B. 145; *Gaboriau v. Maxwell & Co.* (1908), *The Times* newspaper, 12 Dec.

² [1915] 2 K.B. 580.

that led to the discomfiture of the defendant. The facts were as follows:

facts.— The plaintiff sued the defendant in the Isle of Man. The defendant was neither domiciled nor resident in the island, and therefore by the leave of the court he was served with a writ out of the Manx jurisdiction. He appeared 'conditionally' through counsel, who applied to have the proceedings stopped on the grounds (a) that the rules of the Manx High Court did not authorize service out of the jurisdiction; (b) that no cause of action existed within the jurisdiction; and (c) that he was not domiciled in the Isle of Man. Upon the dismissal of this application, the defendant took no further part in the action, but he was ultimately adjudged to pay £800 and costs. The present action was brought in England on that judgment.

It was held that the defendant's application to the Manx court was a submission to its jurisdiction. Buckley L.J. expressed his view in these words:

'When the defendant was served with the process, he had the alternative of doing nothing. He was not subject to the jurisdiction of the court, and if he had done nothing, although the court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the court. But the defendant was not content to do nothing; he did something which he was not obliged to do. . . . He went to the court and contended that the court had no jurisdiction over him. The court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man court and a submission by him to the jurisdiction of that court.'

Cave J. had reached the same conclusion in *Boissière v. Brockner*² some fifteen years earlier, but in that case the defendant, instead of withdrawing from the French action after his unsuccessful protest against the jurisdiction, had proceeded to argue the case on its merits and had, indeed, been successful in the court of first instance.³

¹ [1915] 2 K.B. 580, at pp. 587-8.

² (1889), 6 T.L.R. 85.

³ The case had a long history in the French courts. In the Tribunal of Commerce at Honfleur, judgment was against the defendant on the question of jurisdiction, but in his favour on the merits. The Court of Appeal at Caen affirmed the decision on both points. The Cour de Cassation at Paris set aside the judgment given in favour of the defendant and remitted the case to the Court of Appeal at Rouen for a further trial. The defendant, as he had done in each trial, objected to the jurisdiction, but asked for judgment on the merits, should his objection be overruled. Judgment was against him on both points.

Despite these decisions, however, it can be said with some assurance that to protest is not necessarily to submit. The tide is setting in the opposite direction.¹ In the converse case, where the question is whether a non-resident has submitted to the English court, the judges have refused to regard an appearance as voluntary where all that the defendant has done has been to deny his amenability to the jurisdiction. Thus, Lord Merivale in *Tallack v. Tallack*² repudiated the suggestion that an appearance, 'qualified by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied'. In the later case of *In re Dulles*,³ the Court of Appeal confirmed this view and again held that to object to the international competence of the court is not in itself a submission to the jurisdiction. In the words of Denning L.J.:

Protest
against
jurisdiction
is not
submission

'I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court where he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.'⁴

The Master of the Rolls and Denning L.J. also agreed that *Harris v. Taylor* is not an authority upon the general concept of submission. It must be limited to its precise facts. In that case, the defendant had unsuccessfully contended that the Manx court was not justified by its own procedural rules in assuming jurisdiction over him by allowing service of the writ outside the Isle of Man. Thus the question of jurisdiction had on the facts become *res judicata* between the parties.⁵

A foreign judgment that is given against an absent defendant in default of his appearance is clearly not actionable in England, but is this so if he later moves to have the default judgment set aside and is unsuccessful? The question has not come before the English courts, but in two Canadian cases it was

¹ For instance, the Foreign Judgments (Reciprocal Enforcement) Act disallows the registration of a judgment if the defendant's appearance was limited to protesting the jurisdiction or to protecting property seized or threatened with seizure; *supra*, p. 637.

² [1927] P. 211.

³ [1951] Ch. 842.

⁴ *Ibid.*, at p. 850.

⁵ *Ibid.*, at pp. 849, 851. The Master of the Rolls also suggested that should the occasion arise the decision might be overruled by the House of Lords.

decided that a voluntary appearance of this nature is not to be regarded as a submission to the jurisdiction.¹

Does presence
and submission
alone
confer right
of jurisdiction?

The result so far of our inquiry into the international competence of foreign courts is that jurisdiction sufficient to render a judgment actionable in England exists in two cases, namely, where the defendant was present in the country of the forum at the time of the action, or where he submitted to the jurisdiction. The question now is whether there are any other grounds of competency. In *Emanuel v. Symon*,² Buckley L.J. quoting Fry J. in *Rousillon v. Rousillon*³ said:

'In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued;⁴ (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.'

Is political
nationality
a ground
of jurisdiction?

The last four cases given by the learned judge are covered by the two elements of presence and submission. It remains to consider the first case and to ascertain whether the fact that the defendant is a national of the foreign country where the judgment has been obtained is sufficient to render him amenable to the jurisdiction of the local courts. There is no English authority which contains an actual decision to this effect, but the truth of the proposition has been affirmed *obiter* in several cases.⁵ It is also adopted by textbook writers.⁶ Nevertheless it is

¹ *McLean v. Shields* (1885), 9 Ont. R. 699; *Esdale v. Bank of Ottawa* (1920), 51 D.L.R. 485; cited Read, op. cit., p. 168. The point was taken in *Guiard v. De Clermont*, [1914] 3 K.B. 145, but in that case there had been proceedings in a higher court in which the defendant had taken part.

² [1908] 1 K.B. 302, 309; and see *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 371.

³ (1880), 14 Ch.D. at p. 371.

⁴ Presumably the learned judge means 'selected the forum as the one in which he would sue'; (1870), L.R. 6 Q.B. 161.

⁵ *Douglas v. Forrest* (1828), 4 Bing. 686; *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 371; *Emanuel v. Symon*, [1908] 1 K.B. 302, 309; *Harris v. Taylor*, [1915] 2 K.B. 580, 591. In *Gavin Gibson & Co. Ltd. v. Gibson*, [1913] 3 K.B. 379, 388, Atkin J. considered the dicta to be of such weight that he would 'probably feel compelled to follow them' should the occasion arise.

⁶ Westlake, p. 399; Foote, p. 398; Graveson (hesitatingly), p. 541; Schmitt-hoff, p. 465. It is rejected by Wolff, p. 126, and now by the editors of Dicey, p. 1019. But see Read, op. cit., pp. 151-5.

submitted with some confidence that nationality *per se* is not a reason which, on any principle recognized by private international law, can justify the exercise of jurisdiction. The argument usually advanced in its favour, namely that 'a subject is bound to obey the commands of his Sovereign, and, therefore, the judgments of his sovereign courts',¹ is no doubt true, but as Wolff pointed out it is not the duty of another sovereign to aid the enforcement of the obligation.² Indeed the undesirability of such a rule becomes abundantly clear when it is remembered that it is essentially within the competence of a State to decide who are and who are not its nationals. The granting or withholding of nationality is sometimes an instrument of political policy. Even if this is not the case, the legal tie of nationality may have an extremely slender factual basis. If a Romanian court were to give judgment *in personam* against a person who, though born in Romania, had left that country in his infancy and acquired a domicile in England without taking out letters of naturalization, it is difficult to appreciate the justification for holding the judgment actionable in England. Again, to make allegiance the basis of jurisdiction is scarcely practicable in the case of the British Commonwealth. A British subject resident in Victoria owes allegiance to the Crown, but that fact alone cannot render him liable on a judgment given against him in England.³ Finally, there is no question of reciprocal recognition, for the British nationality of a defendant does not suffice to found the jurisdiction of the English court.

If mere allegiance suffices to give jurisdiction, so also, it might be presumed, does domicile. The connexion between a man and the country in which he is domiciled is generally a very real one, but the tie of allegiance may be of the loosest description. An ineffective exercise of jurisdiction ought not to be tolerated, and it is undeniable that a judgment based on domicile is superior on the score of effectiveness to one based merely on allegiance. Yet the curious thing is that those writers who are content to make political allegiance a ground of jurisdiction deny without hesitation the sufficiency of domicile.

According to the decisions which have dealt with the matter up to the present, it is undoubted that the various circum-

Is domicile
a ground
of jurisdiction?
tion?

Locality
of cause of
action does
not confer
jurisdiction

¹ Dicey (6th ed.), p. 357.

² Wolff, p. 126. He further points out that allegiance is not sufficient even in those Continental countries where nationality is the criterion of the personal law.

³ See the remarks of Scott J. in *Dakota Lumber Co. v. Rinderknecht* (1905), 6 Terr. L.R. 210, cited Read, op. cit., p. 154.

stances considered above exhaust the possible cases in which a foreign court possesses international competence. Thus it is not sufficient that the cause of action, as, for instance, a breach of contract or the commission of a tort, occurred in the foreign country.¹

‘The English courts will not enforce a German judgment against an Englishman for damages for breach of a contract to be performed in Germany when the Englishman was not in Germany at the issue of process and has not submitted to the German jurisdiction, for the Englishman can be sued on the contract in his own courts, which will do justice.’²

Possession
of property
does not
found
jurisdiction

Owing to the case of *Becquet v. MacCarthy*,³ however, it was for some time doubtful whether the possession of immovable property within the foreign country was sufficient to found jurisdiction.

In that case an action had been brought in Mauritius by the plaintiff for damage caused by a fire which started on the premises of the defendant, at that time Deputy Paymaster of the Forces. The defendant was absent from the island during the action. The local law provided that the interests of a resident, who absented himself from the island without leaving an attorney upon whom process might be served, should be in the keeping of the Procurator-General. This official was not required to communicate with the absent person. Judgment by default was given against the defendant.

To an action brought in England on this judgment the defendant pleaded his absence from the jurisdiction, but the plea was disallowed by the court. Lord Tenterden, though admitting that there might be some deficiency in the law of Mauritius, denied that the practice was so contrary to natural justice as to render the judgment void. It is safe to conclude that this decision would not be followed now. Lord Selborne in delivering the judgment of the Privy Council in a later case⁴ said:

‘Of *Becquet v. MacCarthy* it was said by great authority in *Don v. Lippmann*⁵ that “it had been supposed to go to the verge of the law”; and it was explained (as their Lordships think correctly) on the ground that “the defendant held a public office in the very Colony in which he was originally sued”. He still held that office at the time when he was sued; the cause of action arose out of, or was connected with it; and,

¹ *Sirdar Gurdayal Singh v. Faridkote*, [1894] A.C. 670, 684.

² *Per* Scrutton L.J., *Phillips v. Batho*, [1913] 3 K.B. 25, 30.

³ (1831), 2 B. & Ad. 951.

⁴ *Sirdar Gurdayal Singh v. Faridkote*, [1894] A.C. 670, 685.

⁵ (1837), 5 Cl. & Fin. 1.

though he was in fact temporarily absent, he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction.⁷

Whatever truth there may be in this explanation, it has now been decided by the Court of Appeal that neither the fact of possessing property in a foreign country nor the fact of making a partnership contract there relating to the property is sufficient to render the possessor amenable to the local jurisdiction.¹ *Emanuel v. Symon*

The practice, illustrated by Order xi of the English R.S.C.,² under which the courts of a country assume jurisdiction over absentees, raises the question whether a foreign judgment given in these circumstances will be recognized in England.³ Foreign judgment based on service out of the jurisdiction. The authorities, so far as they go, are against recognition. The question arose in *Buchanan v. Rucker*,⁴ where it was disclosed that by the law of Tobago service of process might be effected upon an absent defendant by nailing a copy of the summons on the door of the court house. It was held that a judgment given against an absentee after service in this manner was an international nullity having no extra-territorial effect. Indeed, the suggestion that it should be actionable in England prompted Lord Ellenborough to ask with some disdain:

'Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'

A less fanciful process again raised the question in *Schibsby v. Westenholtz*,⁶ where a judgment had been given by a French court against Danish subjects resident in England.

The mode of citation adopted in accordance with French law was to serve the summons on the Procureur Impérial, the rule being that if a defendant did not appear within one month after such service judgment might be given against him. Although not required by the law, it was customary in the interests of fair dealing to forward the summons to the consulate of the country where the defendant resided, with instructions to deliver it to him if practicable. In the instant case, the defendants were notified of the proceedings in this manner, but they failed to appear and judgment was given against them.

It was held that no action lay upon the judgment. Had the principle upon which judgments are enforceable been comity

¹ *Emanuel v. Symon*, [1908] 1 K.B. 302. ² *Supra*, pp. 111 et seqq.

³ See 2 I. & C.L.Q. 524-6 (J. A. Clarence Smith).

⁴ (1808), 9 East 192.

⁵ *Ibid.*, at p. 194.

⁶ (1870), L.R. 6 Q.B. 155.

or reciprocity, the Court of Queen's Bench intimated that having regard to the English practice of service out of the jurisdiction it would have reached a different conclusion. Since, however, the basis of enforcement is that a judgment imposes an obligation upon the defendant, it followed that there must be a connexion between him and the forum sufficiently close to make it his duty to perform that obligation. No such duty could be spelt out of the inactivity of the defendants, who were aliens resident in a foreign country.

Wright J. reached the same conclusion in a later case where a New Zealand judgment had been given against an absentee under an assumed jurisdiction substantially similar to that countenanced by the English Order xi.¹

Possible
effect of
Travers v.
Holley It is not without significance, however, that in this general context the Court of Appeal in *Travers v. Holley*² acted on the basis of reciprocity and held that what entitles an English court to assume divorce jurisdiction is equally effective in the case of a foreign court. Moreover, Denning L.J. has stated *obiter* that a judgment given in the Isle of Man against an absentee, under rules for service out of the jurisdiction corresponding to those contained in Order xi, would undoubtedly be recognized in England.³ In a later case, however, Hodson L.J. observed that *Travers v. Holley* was 'a decision limited to a judgment *in rem* in a matter affecting matrimonial status, and it has not been followed, so far as I am aware, in any case except a matrimonial case'.⁴

It is submitted with respect that the welcome advance made by that decision towards what a distinguished writer has called 'internationalism'⁵ should not be confined to the single case of matrimonial jurisdiction. In principle it is equally applicable to jurisdiction assumed under provisions substantially similar to those appearing in Order xi. The obstacle to the extension of the doctrine of reciprocity to this particular field is, of course, *Schibsby v. Westenholz*,⁶ but the crux of reciprocal recognition is that the steps which qualify a foreign court to assume jurisdiction should have an approximate equivalent in English law, and perhaps a possible way of escape from that decision is to

¹ *Turnbull v. Walker* (1892), 67 L.T. 767.

² [1953] P. 246; *Carr v. Carr*, [1955] 1 W.L.R. 422: *supra*, p. 397.

³ *In re Dulles*, [1951] Ch. 842, 851.

⁴ *In re Trepca Mines Ltd.*, [1960] 1 W.L.R. 1273, 1281.

⁵ Kahn-Freund, *The Growth of Internationalism in English Private International Law*, pp. 30 et seqq.

⁶ *Supra*, p. 651.

investigate the accuracy of the statement there made that the French judgment was given 'under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, give judgment against a resident in France'.¹ It is submitted that there was a not inconsiderable disparity between the English and French rules.

J (b) Judgments in rem.

The jurisdictional elements that must exist before a foreign judgment *in rem* can claim recognition in England are not difficult to specify, but it is first necessary to appreciate the correct meaning of this species of judgment. It has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation); and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided'.² The effect, for instance, of a condemnation in the Prize Court is to vest the ship in the captors and thus to alter its status. Such a judgment differs fundamentally from one *in personam*. A judgment *in rem* settles the destiny of the *res* itself 'and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence';³ a judgment *in personam*, although it may concern a *res*, merely determines the rights of the litigants *inter se* to the *res*. The former looks beyond the individual rights of the parties, the latter is directed solely to those rights.⁴

Holmes C.J. has described with his usual felicity the difference between the two kinds of judgment. Speaking of actions, he says:

'If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defence, the action is *in personam*, although it may concern the right to, or possession of, a tangible thing. If, on the other hand, the object is to bar indifferently all who

Meaning of judgment *in rem*

Contrasted with judgment *in personam*

Whether an action is *in rem* depends upon the number of persons affected

¹ *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, 159.

² *Lazarus-Barlow v. Regent Estates Co. Ltd.*, [1949] 2 K.B. 465, 475 *per* Evershed L.J., citing the definition given in Halsbury's *Laws of England* (3rd ed.), vol. 22, p. 742. And see *Fracis Times & Co. v. Carr* (1900), 82 L.T. 698, 701.

³ *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1949] Ch. 369, 383, *per* Jenkins J.

⁴ *Castrigue v. Imrie* (1870), L.R. 4 H.L. 414, 427.

might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence the *res* need not be personified and made a party defendant, as happens with the ship in the Admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the *res* as defendant are mere symbols, not the essential matter.¹

Extra-territorial recognition of judgments *in rem* A foreign judgment which purports to operate *in rem* will not attract extra-territorial recognition unless it has been given by a court internationally competent in this respect. In the eyes of English law, the adjudicating court must have jurisdiction to give a judgment binding all persons generally. If the judgment relates to immovables, it is clear that only the court of the situs is competent.² In the case of movables, however, the question of competence is not so simple, since there would appear to be at least three classes of judgments *in rem*.³

(a) Judgments which immediately vest the property in a certain person as against the whole world.

These occur, for instance, where a foreign court of Admiralty condemns a vessel in prize proceedings.

(b) Judgments which decree the sale of a thing in satisfaction of a claim against the thing itself.

A judgment which orders a chattel to be sold is a judgment *in rem* if the object of the sale is to afford a remedy, not by execution against the general estate of the defendant, but by appropriating the chattel in satisfaction of the plaintiff's claim. Such a judgment is not the same as the sentence of an Admiralty court in a prize case which immediately vests the property in the claimant, but it is analogous thereto if the money demand of the plaintiff in respect of which it is given is a demand against the chattel and not against the owner personally.⁴ In all cases, therefore, the nature of a foreign judgment that has ordered the sale of some chattel must be determined by ascertaining whether according to the foreign law the original action was a

¹ *Tyler v. Judges of the Court of Registration* (1900), 175 Mass. 71; Beale's *Cases on the Conflict of Laws* (1st ed.), i. 317, 320.

² *In re Treppa Mines Ltd.*, [1960] 1 W.L.R. 1273, 1277.

³ *Westlake*, s. 149.

⁴ *Imrie v. Castrique* (1860), 8 C.B. (N.S.) 405, 411-12, Cockburn C.J.

suit against the chattel. The subject was elaborately considered by fourteen judges in the leading case of Castrique v. Imrie.¹ 1860

The owner of a British ship mortgaged her to X while she was on a voyage. During the voyage the master drew a bill of exchange on the owner for the cost of certain repairs and indorsed it to a Frenchman at Le Havre. The indorsee brought an action on the bill against the master at Le Havre, and obtained a judgment which declared as follows: 'The Tribunal condemns Benson in his quality (capacity) of captain of the vessel *Anne Martin*, and by privilege on that vessel to pay to the plaintiff' the amount of the bill. The court declared the master to be free from arrest to which otherwise he would have been liable. A higher court, though having an opinion from the Attorney-General that by English law the mortgagee had a better right than the indorsee, affirmed the decision and ordered the ship to be sold. The ship, having been sold, ultimately arrived in England, and the mortgagee brought an action in the Court of Common Pleas to recover her, on the ground that the sale in France was illegal and void.

The decision necessarily depended upon the nature of the French judgment. If it was *in rem*, then the plaintiff must fail, since the ship was in France at the time of the proceedings. If the judgment was *in personam* it was not binding on the mortgagee, since he had been absent from the French proceedings. The Court of Common Pleas held the judgment to be *in personam*, but the Exchequer Chamber and the House of Lords reversed this decision.

The 'privilege' which the judgment created on the ship was, according to French law, a species of lien, and although the proceedings were started against the master as well as against the ship, the sale was ordered, not in execution of the judgment debt, but in enforcement of the lien.

'I think', said Bramwell B., 'the proceeding was, if against the master, also against the ship; and the ship was specifically ordered to be sold, not as the master's ship or the debtor's ship, but as being the ship on which there was a lien or privilege.'²

A more striking example of the manner in which English courts pay recognition to foreign judgments *in rem* is afforded by *Minna Craig Steamship Co. v. Chartered Bank of India*,³ for there the lien which had been declared by a German court was one which conflicted with the principles of English internal law.

¹ (1860), 8 C.B. (N.S.) 1; reversed, *ibid.*, p. 405; reversal affirmed (1870), L.R. 4 H.L. 414.

² 8 C.B. (N.S.), at p. 420.

³ [1897] 1 Q.B. 55; affirmed p. 460.

In this type of case, the only court competent to give a judgment affecting the status of a *res* that will command general recognition is the court of the country where the *res* was situated at the time of the action.

'We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.'¹

(c) Judgments which order movables to be sold by way of administration.²

If, in the course of administering an estate in bankruptcy or on death, a foreign court orders the sale of chattels, the sale will be regarded as conferring a title upon the purchaser valid in England. In the case of succession on death, jurisdiction to make such an order resides in the court of the country where the deceased died domiciled.³ The court competent to make an adjudication in bankruptcy has already been considered.⁴

Relating
to personal
status

The *res* which may form the subject-matter of a judgment *in rem* is not confined to physical things. If the essence of such a judgment is that it constitutes an adjudication upon status, it follows that certain decrees declaring the status of persons must also be classed as operating *in rem*. This was made clear by Lord Dunedin in a memorable passage:⁵

'The other point on which I want to say a few words is the question of what is a judgment *in rem*. All are agreed that a judgment of divorce is a judgment *in rem*, but the whole argument of the judges in the Court of Session turns on the distinction between divorce and nullity. The first remark to be made is that neither marriage nor the status of marriage is, in the strict sense of the word, a *res*, as that word is used when we speak of a judgment *in rem*. A *res* is a tangible thing within the jurisdiction of the court, such as a ship or other chattel. A meta-physical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savours of a *res*, and has all along been treated

¹ *Castrique v. Imrie* (1870), 4 H.L. 414, 429.

² Westlake, s. 149.

³ See *In re Truport, Trafford v. Blanc* (1887), 36 Ch.D. 600.

⁴ *Supra*, pp. 520-3.

⁵ *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 662, and see *per* Lord Haldane at pp. 652-3.

as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a *res*, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage.'

Thus, the word *res* as used in this context includes those human relationships, such as marriage, which do not originate merely in contract, but which constitute what may be called institutions recognized by the State.¹ A foreign court which issues, for instance, a decree of divorce or nullity of marriage will, if competent in respect of jurisdiction, be deemed to have pronounced a judgment *in rem* that is conclusive in England and binding on all persons. Moreover, judgments *in personam* which are ancillary to such judgments *in rem* are equally binding in England. An illustration of this is afforded by *Phillips v. Batho*,² where the facts were these:

Judgments
in personam
that are
ancillary to
judgments
on status

Read. The plaintiff, domiciled in India, obtained a divorce from his wife in an Indian court, and was awarded damages against the defendant, as co-respondent. The defendant was not present in India at the time of the suit, nor did he submit to the jurisdiction. The plaintiff then sued him in England to recover the damages awarded by the Indian judgment.

This judgment, if treated as one *in personam*, was not actionable in England, since the Indian court had no jurisdiction *in personam* over the defendant. Neither, in the opinion of the learned judge, could the plaintiff sue in England on the original cause of action, for the English court has divorce jurisdiction only where the parties are domiciled in England. Scrutton J., however, avoided the difficulties by holding that the judgment awarding damages was ancillary to the judgment *in rem* dissolving the marriage,³ and, as such, was probably conclusive everywhere, and at any rate was conclusive in another part of the British Empire.⁴

'Marriage and the dissolution of marriage are matters of status, and the judgments of the Indian court in this matter are *in rem* and bind the world. Ancillary and accessory to the judgment as to status is the power

¹ Cp. Lord Haldane in *Salvesen's Case*, [1927] A.C. at pp. 652-3.

² [1913] 3 K.B. 25.

³ It has now been decided that an action for damages against an adulterer is not necessarily ancillary to the divorce judgments, *Jacobs v. Jacobs and Ceen*, [1950] P. 146; *supra*, p. 392.

⁴ 'A holding which created a new type of judgment—a hybrid obtained by crossing an action *in rem* with an action *in personam*, with the dominant jurisdictional characteristics being possessed by the former.' Read, *op. cit.*, p. 264.

to give damages against the person causing the marriage to be dissolved. . . . The English courts will recognize and enforce the judgments as to status of the Indian courts in matters within their jurisdiction, and I think they will also recognize and enforce the ancillary order as to damages, such as they themselves make in similar cases.¹

B. Finality of the judgment

Judgment must amount to *res judicata* in country where given

A foreign judgment does not create a valid cause of action in England unless it is *res judicata* by the law of the country where it was given.² It must be final and conclusive in the sense that it must be unalterable in the court which pronounced it.

Must be a final determination of the issue

Thus one inquiry is whether the judgment is provisional or whether, so far as the adjudging court is concerned, it sets the issue between the parties at rest for ever. If it is in the nature of a provisional order which contemplates that a fuller investigation leading to a final decision may later be held, it creates no obligation that is actionable in England. This aspect of the meaning of finality and conclusiveness is illustrated by the leading case of *Nouvion v. Freeman*,³ where the facts were as follows:

*Nouvion v.
Freeman*

X, who had sold certain land in Seville to Y, brought an 'executive' action in Spain against Y and obtained a 'remate' judgment for a large sum of money. There are two kinds of proceedings under Spanish law: executive or summary proceedings, and 'plenary' or ordinary proceedings. In an executive action, upon proof of a prima facie case, the judge without notice to the defendant makes an order for the attachment of his property. Notice of the attachment is given to the defendant and he is at liberty to appear and defend the action. But the defences open to him are limited in number, and in particular he cannot set up any defence which denies the validity of the transaction upon which he is sued. If, for instance, the action is for money due under a writing, he may prove that he has paid the sum or that he has been released, but he cannot deny the execution of the instrument nor attack it on the ground of fraud, misrepresentation, duress or the like. A plaintiff who fails can later begin plenary proceedings in which the whole merits of the case are examined, and he cannot be met by the plea of *res judicata*. If the plaintiff succeeds in the executive action, he obtains a 'remate' judgment which orders execution to issue for a certain sum of money. The defendant, however, may then bring a plenary action before the

¹ *Per* Scrutton J. at p. 32. The decision has been subjected to a devastating criticism by Read, *Recognition and Enforcement of Foreign Judgments*, pp. 264-7.

² *Nouvion v. Freeman* (1887), L.R. 37 Ch.D. 244, 255, Lindley L.J.; *In re Riddell* (1888), 20 Q.B.D. 512, 516, Lord Esher.

³ (1889), L.R. 15 App. Cas. 1.

same judge, and in this may set up every defence that is known to the law.

It was held by the House of Lords, affirming the Court of Appeal, that an action brought by *X* against *Y* in England on the 'remate' judgment must fail. A judgment is not final and conclusive unless it once and for all adjudicates upon the rights and liabilities of the parties, and this is not true of a 'remate' judgment that is liable to be abrogated or varied by the adjudicating court. It is not *res judicata* with regard to either party, neither does it extinguish the original cause of action.

Again, to take another important example, a judgment in default of appearance does not satisfy the condition of finality if it is given in a country where the defendant is allowed to apply within a limited time for its rescission by the adjudicating court.¹ Judgment in default of appearance

The necessity for finality and conclusiveness appears in a slightly different aspect in the cases dealing with alimony. It is a familiar doctrine of domestic English law that no action can be brought in the King's Bench Division to recover alimony which is due under an order of the Divorce Court. The reason is that, since the Divorce Court can vary its own order at any time both with regard to past as well as future instalments, there is no final adjudication upon which to proceed. 'The decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact.'² The same consideration affects foreign alimentary decrees where it is sought to enforce them in England.³ Thus in *Harrop v. Harrop*⁴ the issue was an order for alimony made in Perak. Alimony cases

The law of Perak on this matter is as follows. A magistrate may order a person to pay a monthly allowance for the maintenance of his wife, and, if such order is disregarded, may direct the amount due to be levied in the manner in which fines are levied. Upon application by the husband or wife and upon proof of a change in the circumstances of the parties, the magistrate may vary the amount to be paid. *Harrop v. Harrop*

In the present case a magistrate had ordered the payment of a monthly sum, and later, when this fell into arrears, had ordered that payment of the arrears should be enforced by the

¹ Wolff, op. cit., pp. 264-5.

² *McGuire v. McGuire* (1921), 50 Ont. L.R. 100, at p. 104, cited 26 *Australian L.J.* 407 (J. G. Fleming).

³ *Harrop v. Harrop*, [1920] 3 K.B. 386; *In re Macartney*, [1921] 1 Ch. 522; *Beatty v. Beatty*, [1924] 1 K.B. 807.

⁴ [1920] 3 K.B. 386.

appropriate method. The wife failed in the action which she brought in England upon these orders. Sankey J. in the course of his judgment put the gist of the matter in these words:

'In my view a judgment or order cannot be said to be final and conclusive if (1) an order has to be obtained for its enforcement, and (2) on application for such an order the original judgment is liable to be abrogated or varied.'¹

If a court is empowered to vary the amount of future payments of alimony but cannot alter its order as to accrued instalments, then instalments that are already due under the foreign judgment may be recovered by action in England.² *Harrop v. Harrop* is not inconsistent with this rule, for in that case no evidence was given to show that the amount of accrued instalments was unalterable.

Pending appeal abroad no bar to action in England The requirement of finality means that the judgment must be final in the particular court in which it was pronounced.³ It does not mean that there must be no right of appeal. Neither the fact that the judgment may be reversed on appeal, nor even the stronger fact that an actual appeal is pending in the foreign country, is a bar to an action brought in England,⁴ though where an appeal is pending the English court has an equitable jurisdiction to stay execution, which it will generally exercise.⁵ If, however, the effect under the foreign law of a pending appeal is to stay execution of the judgment, it would seem that in the interim the judgment is not actionable in England.⁶

(C) *The judgment, if in personam, must be for a fixed sum*

Foreign judgment must be for a definite sum As we have seen, the ground upon which a foreign judgment is enforceable in England is that the defendant has implicitly

¹ At p. 399. The Maintenance Orders (Facilities for Enforcement) Act, 1920, provides machinery by which maintenance orders made in any part of H.M.'s dominions outside the United Kingdom may be registered in an English court. A registered order has the same force and effect as if it had been made by the court in which it is registered. See, for example, *Harris v. Harris*, [1949] 2 All E.R. 318; *Pilcher v. Pilcher*, [1955] P. 319. Maintenance orders made by a court in any part of the United Kingdom may be registered and so made enforceable in another part of the United Kingdom; Maintenance Orders Act, 1950.

² *Beatty v. Beatty*, [1924] 1 K.B. 807.

³ *Beatty v. Beatty*, *supra*, at pp. 815-16, *per* Scrutton L.J.

⁴ *Scott v. Pilkington* (1862), 2 B. & S. 11.

⁵ *Scott v. Pilkington*, *supra*; *Nouvion v. Freeman* (1889), L.R. 15 App. Cas. 1, 13.

⁶ *Patrick v. Shedden* (1853), 2 E. & B. 14, especially judgment of Wightman J.

promised to pay the amount in which he has been condemned.¹ It follows that there can be no question of enforcing a foreign decree for specific performance or for the specific delivery or restitution of chattels. Moreover, the law implies a promise to pay a definite, not an indefinite, sum.² Unless in an action *in personam* the foreign court has definitely and finally determined the amount to be paid, no action is maintainable in England.³ In *Sadler v. Robins*⁴ a court in Jamaica had decreed that the defendant should pay to the plaintiff £3,670. 1s. 9½d., first deducting therefrom the full costs expended by the defendant, such costs to be taxed by a master of the court. It was held that until taxation the plaintiff had no cause of action in England, since the sum due on the Jamaican decree was indefinite. A sum, however, satisfies the requirement of certainty if it can be ascertained by a simple arithmetical process.⁵

(2) CONCLUSIVENESS OF FOREIGN JUDGMENTS

The extent to which a foreign judgment is effective as *res judicata* has not always been clear. Even as late as 1839, Tindal C.J. was able to say:

'Great doubts have formerly existed, and some degree of doubt still exists, whether a judgment so recovered [i.e. abroad] is conclusive between the parties, or whether the matter may be opened and agitated in this country.'⁶

Formerly
doubtful
whether
judgment
impeach-
able on
merits

The controversy was whether a foreign judgment could be impeached on its merits. Adherents to the theory of comity maintained that, since English courts are under no obligation to enforce foreign judgments, but only do so *ex gratia* and from a wish to extend the limits of justice, it would be an extension of injustice to enforce a judgment which ought never to have been given. Those opposed to this view argued that 'facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them', and that if English courts were to undertake the rehearing of cases which had already been decided by the appropriate foreign court great injustice would generally be caused.⁷

¹ *Grant v. Easton* (1883), L.R. 13 Q.B.D. 302.

² *Sadler v. Robins* (1808), 1 Camp. 253, 256, Lord Ellenborough.

³ *Sadler v. Robins*, *supra*; *Henderson v. Henderson* (1844), 6 Q.B. 288.

⁴ *Supra*.

⁵ *Beatty v. Beatty*, [1924] 1 K.B. 807.

⁶ *Smith v. Nicolls* (1839), 5 Bing. N.C. 208, 221.

⁷ The above is taken practically verbatim from *S.L.C.* (13th ed.), ii. 717-18, notes to *Duchess of Kingston's Case*.

To impeach
merits is
contrary to
doctrine of
obligation

When, however, it was established that the enforceability of a foreign judgment depended upon whether or not a legal obligation had been imposed on the defendant,¹ the view that the merits of a foreign decision are open to review in England, became untenable. It would stultify this doctrine of obligation if the English court were to arrogate to itself liberty to examine whether the foreign court ought in the circumstances to have imposed any obligation upon the defendant. Such an attitude would force the plaintiff back to his original cause of action, and it would avail him little that he had already been successful abroad. If we are prepared to enforce an obligation as having been imposed by a competent court, we must admit that the obligation was properly imposed. The confusion that formerly surrounded this subject was no doubt caused by the omission to distinguish between a right to examine a judgment for want of jurisdiction and a right to attack it on its merits.² A foreign judgment must be examinable on the first ground, for an obligation can be imposed only by an authority which is competent to bind the defendant, but once it is admitted that an authority had such competence, it is inconsistent with the doctrine of obligation to review the correctness of any particular command that it may have issued.

Now
settled
that
judgment
not im-
peachable
on merits

It is now established beyond any doubt that in an action on a foreign judgment the English court is not entitled to investigate the propriety of the proceedings in the foreign court.³ Erroneous judgments delivered by a foreign court are not void in England.⁴ The merits of the case have been argued and determined, and if one of the parties is discontented with the decision his proper course is to take appellate proceedings in the forum of the judgment. The English tribunal, in other words, cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties.⁵ The defendant in England may show that the foreign court had no jurisdiction to try the case, or he may plead a limited number of defences, such as fraud, which

¹ *Supra*, p. 629.

² *S.L.C.* ii. 720.

³ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790; *Messina v. Petrocchino* (1872), L.R. 4 P.C. 144; *Bank of Australasia v. Nias* (1851), 16 Q.B. 717; *Henderson v. Henderson* (1844), 6 Q.B. 288; *Vanquelin v. Bouard* (1863), 15 C.B. (N.S.) 341; *Godard v. Gray* (1870), L.R. 6 Q.B. 139; *Vadala v. Lawes* (1890), 25 Q.B.D. 310, 316.

⁴ *Imrie v. Castrique* (1860), 8 C.B. (N.S.) 405, at p. 428, *Martin B.*

⁵ *Dent v. Smith* (1869), L.R. 4 Q.B. 414, 446; *Imrie v. Castrique*, *supra*.

will be considered later,¹ but he is not at liberty to show that the court mistook either the facts or the law upon which its judgment was founded.²

In pursuance of this doctrine it was early established that a judgment debtor sued in England could not impeach a foreign decision, either on the ground that in the original proceedings he had been denied some defence available to him, or on the ground that the foreign court had mistaken its own law or had reached an erroneous conclusion as to the facts. Thus in *Henderson v. Henderson*:³

No defence that foreign court mistaken as to facts or as to its own law

It was pleaded to an action on a Newfoundland judgment, (a) that the plaintiff had brought the original suit in right of her husband without proving any right to sue in a representative character, and (b) that the defendant had a right of set-off against the husband.

Both these pleas were held bad. Again, in *Ellis v. M'Henry*:⁴

Judgment had been recovered in Canada in an action which would have failed had the defendant pleaded a certain composition deed.

Defences available in foreign court cannot be raised here

The plaintiff sued on this judgment in England, and the question was whether the defendant was entitled at that stage to set up the deed as a defence. Bovill C.J. dismissed the contention in these words:

'We are accustomed, and indeed bound, to give effect to final judgments of the courts of other countries and of our colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments is not allowed to be again brought into contest in our courts. The only ground on which the judgment in [the present case] was sought to be impeached upon the pleadings before us, was that there was a defence to the original claim by the discharge under the deed; but that would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained, or in this action which is brought to enforce it; *ne lites immortales essent dum litigantes mortales sunt*.'

The more serious question that was left open was, whether a foreign judgment could be impeached on the ground that the court had made an obvious mistake with regard to English law when purporting to give a decision according to that law. If it is apparent that a foreign judgment has been founded on a mistaken notion of English law, is it conclusive in England?

Foreign judgment unimpeachable even if based on mistake as to English law

¹ *Infra*, pp. 667 et seqq.

² *Bank of Australasia v. Nias*, *supra*, at p. 735; *Godard v. Gray*, *supra*, at

p. 150.

³ (1844), 6 Q.B. 288.

⁴ (1871), L.R. 6 C.P. 228.

It is now decided that such a mistake does not excuse the defendant from performing the obligation that has been laid upon him by the judgment.¹ The doctrine that a foreign judgment cannot be impeached as to merits has been carried to its logical conclusion. Thus in *Godard v. Gray*:²

The plaintiffs, who were Frenchmen, sued the defendants (Englishmen) in France on a charter-party, the proper law of which was English law. The charter-party contained the clause: 'Penalty for non-performance of this agreement estimated amount of freight.' The effect of such a clause under English law is not to quantify the damages exactly, but to leave them to be assessed according to the actual loss suffered; but the French court, believing that the language of the charter-party was to be understood in its natural sense, fixed the damages payable by the defendant at the exact amount of freight. When sued upon the judgment in England, the defendants pleaded this mistaken view of English law in defence. The plea failed. The court held that there can be no difference between a mistake as to English law and any other mistake.

Foreign court must have had internal competence
Lindley L.J. once said that the jurisdiction which alone is important in connexion with a foreign judgment is the competence of the foreign court in the international sense. 'Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.'³ According to this view, action will lie in England upon a foreign judgment although delivered by a court that, according to its own internal law, had no jurisdiction whatsoever over the cause of action. If, for instance, as is possible in the case of the English County Court, the foreign court has adjudicated upon a claim in excess of the legally permitted amount, is it to be no answer to an action on the judgment in England that the court lacked internal jurisdiction? To admit this would be inconsistent with principle. According at any rate to the English rule, a judgment delivered by a court with no jurisdiction is a complete nullity, and it seems curious that what was null and void in the foreign country can be regarded as valid for the purposes of an English action. Such a foreign judgment creates no right whatsoever in favour of the plaintiff, yet it is because a right has been vested in him that, according to the doctrine of obligation, he may sue on the judgment in England. The dictum of Lindley L.J., for it was nothing more, was not applied in *Papadopoulos v. Papadopoulos*,⁴

¹ *Castrique v. Imrie* (1870), L.R. 4 H.L. 414; *Godard v. Gray* (1870), L.R. 6 Q.B. 139.

² *Pemberton v. Hughes*, [1899] 1 Ch. 781, 791.

³ [1930] P. 55; *supra*, pp. 407-8.

⁴ (1870), L.R. 6 Q.B. 139.

where one of the grounds upon which the Cypriot decree of nullity was held to be ineffective was that the court had no power by the law of Cyprus to declare the marriage null and void.

On the other hand, it is essential to observe that if the foreign court is internally competent the fact that it has erred in its own rules of procedure is no answer to an action in England. This is the explanation of *Pemberton v. Hughes*,¹ the case in which Lindley L.J. delivered his dictum. In that case:

Procedural
mistake of
foreign
court no
answer to
English
action

A decree for divorce had been pronounced by the competent court in Florida in an undefended suit brought by a husband against his wife, both parties being domiciled and resident in Florida. It appeared that she had received only nine days notice of the proceedings instead of ten days as required by the law of Florida. It was held by the Court of Appeal that the decree was final and was binding in England.

Lindley L.J. in the course of his judgment said:

'All that the English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely its competence to deal with the sort of case that it did deal with, and its competence to require the defendant to appear before it.'²

In other words, the Florida court was not only internally competent to deal with a case of divorce, but also internationally competent, since the defendant was domiciled in Florida. The learned judge then concluded as follows:

'If the court had jurisdiction in this sense, and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided that no substantial injustice, according to English notions, has been committed.'³

At first sight the decision of the Court of Common Pleas in *Vanquelin v. Bouard*⁴ may seem difficult to reconcile with this statement of the law.

This was an action in England upon a judgment obtained in France on a bill of exchange. The defendant pleaded that by French law the French court had no jurisdiction, since the defendant was not a trader and was not resident at Orleans where the bills were drawn. The plea was disallowed.

If the plea meant that the French action had been brought in the wrong court⁵ and if this were so, it is arguable that the

¹ [1899] 1 Ch. 781.

² At p. 790.

³ At pp. 790-1.

⁴ (1863), 15 C.B. (N.S.), 341.

⁵ See *Pemberton v. Hughes*, [1899] 1 Ch. 781, 791, *per* Lindley L.J.

judgment was a nullity. Erle C.J. denied, however, that the court lacked internal jurisdiction. He said:

'I am of opinion that the judgment of a foreign court is valid if the court has jurisdiction over the person and over the subject-matter of the action: and it seems to me upon this plea that the court . . . had jurisdiction over the subject-matter of the suit in which the judgment was obtained, viz. the liability of the acceptor of a bill of exchange, and that if it were a matter of defence that the defendant was not a trader or not resident within the jurisdiction of the court, it was a matter of defence that ought to have been set up by way of defence in that court, and cannot avail the defendant in an action upon the judgment here.'¹

Thus the French tribunal was competent 'to deal with the sort of case that it did deal with', to quote the words of Lindley L.J. again, though perhaps the defendant might have pleaded in defence that he personally was not within that competence. In explanation of both *Pemberton v. Hughes* and *Vanquelin v. Bouard* a modern writer says: 'The court had competence in the sort of case involved, but there was a mistake or irregularity of procedure in the exercise of that competence which rendered the right created by the judgment merely voidable, capable of being made void by subsequent proceedings.'² A significant feature of *Vanquelin v. Bouard* is that the defendant let the French proceedings go by default. Further, he did not plead in the English action that the French judgment was a complete nullity.

Con-
clusiveness
of foreign
judgments
sum-
marized

A foreign judgment given by a court of competent jurisdiction is *res judicata* in two senses: it furnishes the successful party with a separate cause of action enforceable in England and provides him with an effective defence if he is sued by the other party in England on the original cause of action. In the words of Lord Campbell:

'I was clearly of opinion that a foreign judgment might be pleaded as *res judicata* because the foreign tribunal has clearly jurisdiction over the matter, and both parties having been regularly brought before the foreign tribunal, and that tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause.'³

Thus the satisfied judgment of a foreign court, even though the amount awarded is not full compensation for the loss suffered,

¹ *Vanquelin v. Bouard* (1863), 15 C.B. at p. 368.

² Read, *Recognition and Enforcement of Foreign Judgments*, p. 100.

³ *Ricardo v. Garcias* (1845), 12 Cl. & Fin. 368, 401; i.e. against the successful defendant.

is a good defence to an action brought by the plaintiff in England for the residue of his claim.¹ Having elected to sue the defendant in the foreign country and having received the amount awarded, he cannot seek a better judgment from the English court in respect of the same injury.² But if he has two causes of action founded on the same damage against separate defendants, as where the drivers of two vehicles have collided and caused him injury, a satisfied judgment of a foreign court against one of them does not bar him from suing the other in England.³ He cannot, however, sustain such an action if the amount awarded him by the foreign judgment is sufficient to compensate him fully for the damage suffered, for English law does not tolerate double satisfaction.⁴

The principle of *res judicata* applies both to actions *in personam* and actions *in rem*, for as regards their degree of conclusiveness these actions differ from each other only in the number of persons who are bound by the judgment. A judgment *in personam* binds the parties and their privies if they litigate the same issue in England. A judgment *in rem* has a wider operation, since it is conclusive against all the world.⁵

'Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other tribunal.'⁶

Both judgments *in rem* and judgments *in personam* are conclusive upon the point decided, but in the former 'the point', since it is the determination of status, is conclusive against the whole world, while in the latter, since it is unconcerned with status, it is conclusive only between parties and privies.⁷

(3) DEFENCES AVAILABLE TO THE DEFENDANT

Despite the fact that the foreign judgment upon which the defendant is sued is final and conclusive, it is still open to him to escape liability by pleading any one of three defences. These are that the judgment has been obtained by fraud, or that it is

¹ *Taylor v. Hollard*, [1902] 1 K.B. 676.

² *Barber v. Lamb* (1860), 8 C.B. (N.S.) 95, 100, *per* Erle C.J.

³ *Kohnke v. Karger*, [1951] 2 K.B. 670.

⁴ *Kohnke v. Karger*, *supra*.

⁵ *Supra*, pp. 653 et seqq.

⁶ Story, s. 592, adopted by the House of Lords in *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, 428-9.

⁷ *Ballantyne v. Mackinnon*, [1896] 2 Q.B. 455, 462.

contrary to natural justice, or that it is repugnant to public policy as understood in England.

(i) *Foreign judgment obtained by fraud.*

Domestic
judgments
impeach-
able for
fraud

If we omit all reference to private international law for the moment, we find a well-established rule that a domestic judgment may be impeached on the ground that it was obtained by fraud.¹ The unsuccessful party, instead of appealing or applying for a new trial, may bring an independent action to set aside the judgment.² It is not a method which is encouraged,³ or one which, owing to the strict burden of proof imposed upon the plaintiff, easily succeeds. His action will be struck out as vexatious and frivolous unless the statement of claim gives particulars of some fraudulent act which, if proved, would entitle him to succeed, and unless it affords some explanation why the fact complained of was not adduced in evidence during the original proceedings.⁴

The mean-
ing of
'fraud'

The point, however, which has an important bearing upon private international law, is the meaning of 'fraud' in this connexion. Of what nature must the fraud be in order to justify the setting aside of a domestic judgment? The answer is contained in the classic judgment of Grey C.J. in *The Duchess of Kingston's Case*,⁵ which definitely established that judgments are impeachable for fraud. Referring to the judgment of a Spiritual Court, he said:

'But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the point, and *not to be impeached from within*; yet, like all other acts of the highest judicial authority, it is impeachable *from without*: although *it is not permitted to show that the court was mistaken, it may be shown that they were misled*.

'Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice.'

The essential distinction, therefore, is between mistake and trickery. An unsuccessful litigant cannot bring an independent action to set aside a judgment as having been erroneous with

¹ *Duchess of Kingston's Case* (1776), 2 S.L.C. 717; Kerr on *Fraud*, pp. 301, 365; Spencer Bower on *Actionable Misrepresentation*, pp. 358-63.

² *Flower v. Lloyd* (No. 1) (1877), 6 Ch.D. 297; *Jonesco v. Beard*, [1930] A.C. 298.

³ *Flower v. Lloyd* (No. 2) (1879), 10 Ch.D. 327, 333-4, James L.J., though Baggallay L.J. dissented.

⁴ *Birch v. Birch*, [1902] P. 130, 136, Vaughan Williams L.J.

⁵ (1776), 2 S.L.C. 644.

regard to the law or the facts, for appellate proceedings are available to him; but he can bring such an action on the ground that the court was imposed upon. He must be able to point to some fact 'from without', some fact which was not before the court that pronounced the judgment. The facts upon which he bases his present claim must not have been in issue in the original action.

That this is the nature of the fraud which alone justifies an action to set aside a judgment becomes evident upon a consideration of the decisions in which such actions have succeeded. Thus, judgments have been set aside upon proof that the parties acted in collusion;¹ or that an essential document was suppressed;² or that a forged will,³ a false affidavit⁴ or certain false and counterfeit documents⁵ were put in evidence; or that the judgment debtor was fraudulently induced not to appear in the original proceedings;⁶ or that fresh material evidence has been obtained since the judgment which could not have been obtained earlier.⁷ On the other hand, it has been held that alleged perjury before the original court is not a sufficient ground for the setting aside of a judgment.⁸ Moreover, the facts upon which the case for setting aside the judgment rests must not have been known to the plaintiff at the time of the original hearing. He must show that he discovered them later.⁹ The principle, then, to be borne in mind is that the issue which was raised in the original proceedings cannot be reopened, or, what is the same thing, that an action to set aside a judgment cannot be used as a means of impeaching that judgment on its merits.

Turning now to private international law, it has repeatedly been affirmed that a foreign judgment is impeachable for

¹ *Bandon v. Becher* (1835), 3 Cl. & F. 479; *Harrison v. Mayor of Southampton* (1853), 4 De G.M. & G. 137.

² *Brooke v. Mostyn* (1865), 2 De G.J. & S. 373.

³ *Priestman v. Thomas* (1884), 9 P.D. 210.

⁴ *Loyd v. Mansell* (1722), 2 P. Wms. 73.

⁵ *Cole v. Langford*, [1898] 2 Q.B. 36.

⁶ *Wyatt v. Palmer*, [1899] 2 Q.B. 106, 109.

⁷ *Burr v. Anglo-French Banking Corp.* (1933), 49 T.L.R. 405. The actual point decided was that a judgment can be set aside if it has been obtained against a corporation (in this case a Chilean corporation) which had no *de jure* existence at the time of the original proceedings.

⁸ *Baker v. Wadsworth* (1898), 67 L.J. (Q.B.) 301; *Jacobson v. Frachon* (1928), 138 L.T. 386, 394, cited *infra*, p. 671; *Perin v. Perin* (1950), Scots L.T.

⁹ *Birch v. Birch*, [1902] P. 130 (will alleged to be forged).

Examples
of judgments set
aside

Foreign
judgments
fraudulently
obtained

fraud,¹ and decisions are to be found which exemplify the proper application of this rule, i.e. which have applied it to cases where the court was imposed upon by some fraudulent trick discovered later.

Foreign
court im-
posed upon
by a trick

Thus in *Ochsenbein v. Papelier*:² 1873.

A French seller, in the course of a dispute in Paris with an English buyer, produced a writ showing that he had begun an action to recover the price of the goods. When remonstrated with, however, he burnt the writ then and there and agreed to refer the dispute to arbitration in London. He nevertheless proceeded with the action behind the buyer's back and obtained judgment by default. The seller brought an action in the Court of Queen's Bench upon this judgment, and the Court of Chancery, when asked by the buyer to restrain the action, refused an injunction as being unnecessary. It was unnecessary, because the above facts, if proved, would afford a good defence to the common law action.

In Canada it has been held that a foreign judgment is re-examinable if the plaintiff fraudulently misled the foreign court into believing that he was subject to its jurisdiction.³

Foreign
court itself
fraudulent

Again, a foreign judgment has been held to be examinable where it was vitiated in the original proceedings, not by the fraud of one or both of the parties, as in the above case, but by the foreign court itself. This cannot be a matter of frequent occurrence, but it was proved to exist in *Price v. Dewhurst*,⁴ where the foreign judgment, which concerned the distribution of property, was delivered by persons who were themselves interested in the subject-matter of the suit.

So far, then, the decisions show no tendency to allow an abnormal effect to fraud when alleged as a reason for defeating a foreign judgment. There is no hint of breaking in upon the rule that such a judgment cannot be impeached on the merits.⁵ In fact, it is admitted in the latest decision on the matter that 'precisely the same tests apply whether the judgment sought to be set aside is a foreign judgment or an English judgment'.⁶ Moreover, it has been decided that, in an action brought in this country upon a foreign judgment, a commission to examine witnesses in the foreign country in aid of the defence to

¹ e.g. *Vadala v. Lawes* (1890), 25 Q.B.D. 310, 316, Lindley L.J.; *Ochsenbein v. Papelier* (1873), L.R. 8 Ch. App. 695, 700, Mellish L.J.

² (1873), L.R. 8 Ch. App. 695.

³ *Biggar v. Biggar*, [1930] 2 D.L.R. 940; cited Read, *Foreign Judgments*, p. 274.

⁴ (1837), 8 Sim. 279.

⁵ *Supra*, pp. 661 et seqq.

⁶ *Syal v. Heyward*, [1948] 2 K.B. 443, 447.

the action here will not be granted.¹ The parties have had their day in court, the facts have been investigated, and the result has been a judgment imposing an obligation upon the defendant.

'I am quite clear', said Atkin L.J. *obiter*, 'that it would not be a defence to a foreign judgment to prove that the court proceeded on the evidence of one of the parties and that the evidence could subsequently be shown to have been perjured evidence; that would be attacking the decision on its merits.'²

The view taken by the courts since 1882, however, has been that fraud is a good defence to a foreign judgment, even though its proof will necessitate the retrial of the original case on the merits³ and even though the fact of the defendant's fraud was known to the plaintiff at the time of the original trial. This puts foreign and domestic judgments on a different footing and is inconsistent with the principle that the same tests apply to both kinds of judgment. A litigant in domestic proceedings who, without being able to prove extrinsic fraud, merely alleges that owing to the fraud of his opponent the adjudicating court came to a wrong decision with regard either to the law or to the facts cannot bring an independent action to set aside the judgment, but must either take appellate proceedings or apply for a new trial; but a litigant who adopts the same line of defence can, if the original proceedings took place abroad, require the English court to try the case afresh. The result is that the doctrine as to the conclusiveness of foreign judgments is very seriously and most illogically impaired.

The three decisions, all given by the Court of Appeal, which have displayed this attitude are the following:

① ✓ *Abouloff v. Oppenheimer*.⁴

This was an action brought on a Russian judgment which ordered the return of certain goods unlawfully detained by the defendant, or alternatively, the payment of their value. One defence was that the judgment had been obtained by fraud in that the plaintiff had falsely represented to the Russian court that the defendant was in possession of the goods, the truth being that the plaintiff himself continued in

¹ *Smith v. Nicolls* (1830), 3 Sim. 458.

² *Jacobson v. Frachon* (1928), 138 L.T. 386, 394. He went on to say that it would be different if the plaintiff had procured a perjured or an unreliable witness. See *Baker v. Wadsworth* (1898), 67 L.J. (Q.B.) 301.

³ *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; *Vadala v. Lawes* (1890), 25 Q.B.D. 310; *Syal v. Heyward*, [1948] 2 K.B. 443.

⁴ (1882), 10 Q.B.D. 295.

possession of them throughout. It was demurred that this was an insufficient answer in point of law, since the plea was one which the Russian court could, and as a matter of fact did, consider, and that to examine it again would mean a new trial on the merits. The demurrer was overruled.¹

Vadala v. Lawes. The facts of the next case, *Vadala* (v) *Lawes*,² were as follows:

(i) / The plaintiff sued the defendant in Italy for the non-payment of certain bills of exchange which had been accepted by the defendants' agent acting under a power of attorney. The principal defence raised in the action was that the bills, which purported to be ordinary commercial bills, were given in respect of gambling transactions without the defendant's authority. The defence was tried on its merits by the Italian court, but failed, and judgment was entered for the plaintiff. The plaintiff then brought an action in England on the judgment.

The case thus raised the simple point whether an allegation of fraud, a matter which has already been fully investigated by a foreign court, can once more be investigated in England. The Court of Appeal unanimously answered the question in the affirmative, and ordered a new trial with a view to discovering whether the bills were given for genuine mercantile dealings or for gambling transactions. Lindley L.J. said:³

'If the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. . . . The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false.'

Syal v. Heyward. The latest decision of the Court of Appeal in *Syal* (v) *Heyward*⁴ goes even further, for it allows the retrial in England notwithstanding that the plaintiff deliberately refrained from raising in the original trial the facts upon which the allegation of fraud is based. The strange result appears to follow that an English defendant to a foreign action may reserve a defence of fraud available to him with the intention of raising it if he is sued on the judgment in England.⁵ Thus, as has been well observed, the irrational rule is suggested that:

'To disturb an *English* judgment allegations of fraud must be based

¹ It should be noticed, of course, that by demurring to the plea the plaintiff admitted the truth of the facts it alleged. ² (1890), 25 Q.B.D. 310.

³ At pp. 316-17. ⁴ [1948] 2 K.B. 443. ⁵ 65 L.Q.R. 84 (Cowen).

on facts subsequently discovered; whereas to re-open a *foreign* judgment on this ground no such limitation of time is imposed. Such a distinction suffers from the defects both of its inherent absurdity and of being completely inconsistent with the proposition, which the court accepted, that the same principles apply in respect of both English and foreign judgments.¹

An attempt to expose more fully the inconvenience and injustice of the rule thus laid down from time to time by the Court of Appeal was made in the first edition of this book,² but to reiterate it now is perhaps of little more value than to plough the sands. It is comparatively safe to prophesy that even the House of Lords will hesitate to overrule decisions that have now stood for nearly fifty years. It is pertinent, however, to remark that the view taken by the English courts has been decisively rejected in Canada.³

Present
rule un-
sound but
probably
binding

(ii) *Foreign judgment contrary to public policy of English law.*

No action is sustainable upon a foreign judgment which is contrary to the English principles of distinctive policy⁴ or which has been given in proceedings of a penal or revenue nature.⁵ There is no need to add anything here to what has already been said about this subject,⁶ except to give one example of the application of the doctrine to the particular case of a foreign judgment. The rule of English law is that 'the general recognition of the permanent rights of illegitimate children and their spinster mothers is contrary to the established policy of this country',⁷ and therefore, where a Maltese court had adjudged a putative father liable to provide his illegitimate daughter with an alimentary allowance without any time-limit, such as minority, being imposed, it was held that no action on the judgment lay in England.⁸

A civil judgment, though combined with a penal judgment,

¹ 12 *M.L.R.* 106 (Graveson).

² pp. 521-4. See also 8 *Can. B.R.* (1930), pp. 231-7.

³ Read, *Foreign Judgments*, pp. 277-81.

⁴ *In re Macartney*, [1921] 1 Ch. 522, 527, Astbury J.; for another ground on which the action failed see *supra*, p. 659.

⁵ *Huntington v. Attrill*, [1893] A.C. 150.

⁶ *Supra*, pp. 154 et seqq.

⁷ *In re Macartney*, [1921] 1 Ch. 522, 527.

⁸ *In re Macartney*, *supra*. There were two other grounds upon which this decision was based. It is, therefore, not clear authority for the dubious view that a foreign judgment is unenforceable in England merely because the cause of action is unknown to English law; see Read, *Foreign Judgments*, pp. 293-5.

may be actionable in England as creating a separate and independent cause of action, despite the general principle¹ that penalties imposed abroad are disregarded. Thus in Raulin (v)

Fischer:²

The defendant, a young American lady, while recklessly galloping her horse in the Bois de Boulogne, ran into the plaintiff, a French officer, and seriously injured him. She was prosecuted by the State for her act of criminal negligence. By French law a person who is injured by a crime may intervene in the prosecution and make a claim for damages, whereupon his civil action is tried together with the prosecution and one judgment is pronounced on both matters. The plaintiff did so intervene. The defendant was convicted of the crime and ordered to pay a fine of 100 francs to the State and 15,917 francs by way of damages and costs to the plaintiff.

It was held on these facts, in an action brought by the plaintiff in England to recover the sterling equivalent of 15,917 francs, that the French judgment was severable. That part of it which awarded the plaintiff damages was not tainted with the penal character of the rest of the proceedings, and therefore might be put in suit in England without involving a recognition of a penal judgment.

(iii) Foreign judgment contrary to natural justice.

Difficulty of defining 'natural justice' Although the judges have frequently asserted that a foreign judgment which contravenes the principles of natural justice cannot be enforced in England, it is extremely difficult to fix with precision the exact cases in which the contravention is sufficiently serious to justify a refusal of enforcement. Shadwell V.-C. once said that 'whenever it is manifest that justice has been disregarded, the court is bound to treat the decision as a matter of no value and no substance'.³ But this goes too far. As we have already seen, a foreign judgment is enforceable notwithstanding that it patently proceeded upon a wrong view of the evidence or of the foreign law, or even of English law, but it would not be extravagant to suggest that this is a questionable application of natural justice. Such a judgment is in a wide sense unjust, but it is difficult to trace delicate gradations of injustice so as to reach a definite point at which it deserves to be called the negation of natural justice. Channell J., in

¹ *Huntington v. Attrill*, [1893] A.C. 150; *supra*, p. 140; *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*, [1935] 1 K.B. 140, *supra*, p. 139.

² [1911] 2 K.B. 93.

³ *Price v. Dewhurst* (1837), 8 Sim. 279, 302.

delivering judgment in a case where the defendant to an action on a Canadian judgment pleaded unsuccessfully the refusal of the Canadian court to admit evidence of a certain fraud which, had it been admitted, would indubitably have disproved his liability, said:¹

'In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough: *Godard v. Gray*;² and whatever the expression "contrary to natural justice", which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does.'

The expression 'contrary to natural justice' has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact scope. The only statement that can be made with any approach to accuracy is that in the present context the expression is confined to something glaringly defective in the procedural rules of the foreign law.³ As Denman C.J. said in an early case:

'That injustice has been done is never presumed, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign court, are repugnant to natural justice: and this has often been made the subject of inquiry in our courts.'⁴

In other words, what the courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case.⁵ The wholesome maxim *audi alteram partem* is deemed to be of universal, not merely of domestic, application. The problem, in fact, has been narrowed down to two cases.

The first is that of assumed jurisdiction over absent defendants. The English courts are reluctant to criticize the procedural rules of foreign countries on this matter and will not measure their fairness by reference to the English equivalents,

¹ *Robinson v. Fenner*, [1913] 3 K.B. 835, 842.

² (1870), L.R. 6 Q.B. 139; *supra*, p. 664.

³ See the judgment of Bramwell B. in *Crawley v. Isaacs* (1867), 16 L.T. 529. For a full review of the subject see Piggott, *Foreign Judgments* (2nd ed.), pp. 167-74.

⁴ *Henderson v. Henderson* (1844), 6 Q.B. 288, 298.

⁵ *Jacobson v. Frachon* (1928), 138 L.T. 386, 390 (Lord Hanworth), 392 (Atkin L.J.); *Buchanan v. Rucker* (1808), 9 East 192; *Rudd v. Rudd*, [1924] P. 72.

Concept of
natural
justice
bound up
with
maxim *audi
alteram
partem*

but, if the mode of citation has been manifestly insufficient as judged by any civilized standard, they will not hesitate to stigmatize the judgment as repugnant to natural justice and for that reason to treat it as a nullity.

Effect of want of notice in case of divorce decrees The relevant cases in modern times have been confined to foreign decrees of divorce. In this field, despite a constant flow of judicial statements that such a decree is void if in fact the respondent had no notice of the proceedings,¹ there is no decision in which its invalidity has been based on this ground alone, provided that the service of notice to the respondent has been in accordance with the recognized practice of the foreign court. In *Rudd v. Rudd*,² for instance, a husband petitioned for divorce in Washington State, U.S.A., and notified his wife by posting a copy of the complaint to an English address at which she had never lived and by advertising the proceedings in the *Seattle Weekly News* which she was not accustomed to read. Horridge J. held that the subsequent decree was void since it was pronounced in the absence and without the knowledge of the wife, but there was the additional and more fatal objection that the husband was domiciled in England. Again, in *Macalpine v. Macalpine*,³ where a divorce was obtained by a husband in Wyoming, his place of domicil, there was not only a lack of notice to the wife, but a fraud perpetrated upon the court. The husband deliberately deceived the Wyoming court 'into letting the petition come to trial without the wife being sent proper notification as to the proceedings that were being taken'.⁴ On the other hand, where the sole cause of complaint has been lack of notice, there are three modern cases in which the plea of repugnancy to natural justice has been invoked in vain.⁵

Quaere whether judgments in rem on a different footing The broad result of the authorities, then, seems to be that if the procedural rules of the competent court have been regularly and bona fide observed the decree of divorce will stand, notwithstanding that in fact the respondent remained ignorant of the proceedings, unless, indeed, those rules are so imperfect as to be repugnant to English notions of natural justice.⁶ Of course, it may be that this attitude now adopted by the courts with regard to a judgment *in rem*, such as a decree of divorce,

¹ *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790-1, 792-3, 796-7; *Bater v. Bater*, [1906] P. 209, 237.

² [1924] P. 72.

³ [1958] P. 35.

⁴ *Ibid.*, at p. 40.

⁵ *Boettcher v. Boettcher*, [1949] W.N. 83; 93 S.J. 237; *Maher v. Maher*, [1951] P. 42; *Igra v. Igra*, [1951] P. 404.

⁶ *Macalpine v. Macalpine*, [1958] P. 35, at p. 45, *per* Sachs J.

should not necessarily be extended to a foreign judgment *in personam*. A judgment by which the competent court has determined the status of the subject-matter is not confined in its effect to the parties, but binds all persons generally, and therefore on practical grounds it should not be lightly disregarded. This is especially true of a judgment by which the status of a husband and wife has been finally and conclusively changed in the country of their domicile.¹

Secondly, it is a violation of natural justice if a litigant, though present at the proceedings, was unfairly prejudiced in the presentation of his case to the court. A clear example of this would be if he were totally denied a right to plead, but the defence of unfair prejudice is not one that is lightly admitted. It is not sufficient, for instance, that his personal evidence was excluded, if the procedural rule of the forum is that parties may not give evidence on their own behalf.² Again, the defence will not succeed if the alleged unfairness consisted of something that might have been combated and removed in the foreign action. The question whether this was the true position arose in *Jacobson v. Frachon*,³ where the facts were as follows:

A & Co. of London agreed to buy crêpe de Chine from *B* of Lyons. *A & Co.* brought an action in France for cancellation of the contract and for damages, on the ground that deliveries of the material were short in quantity and inferior in quality. The French court, before giving judgment, appointed an expert to examine the material in London. The expert, who was a relative of *B*, made no proper examination, and, though deputed by the court to take evidence, refused to hear the evidence of *A & Co.* and their witnesses. He ultimately made a report adverse to *A & Co.* which was found by Roche J. to be the uncandid production of a biased and prejudiced mind: Judgment for *B* was given by the French court. *A & Co.* then sued *B* in England for breach of the original contract. *B* pleaded the French judgment in bar of the action, but *A & Co.* replied that this judgment was contrary to natural justice.

The Court of Appeal held that the judgment was not void as contravening the requirements of natural justice, since *A & Co.* had not been prevented from presenting their case to the court. It appeared that by French law the court was not bound by the expert's report, but could reject it if satisfied of its inaccuracy.

¹ 29 *B.X.B.I.L.* 287-8 (J. H. C. Morris).

² *Scarpetta v. Lowenfeld* (1911), 27 *T.L.R.* 509; *Robinson v. Fenner*, [1913]

3 *K.B.* 835.

³ (1928), 138 *L.T.* 386.

A & Co. therefore were at liberty to produce witnesses to the court and to attack the report. It further appeared that *A & Co.* had taken this course, though without success. It could not, therefore, be said that the court had refused to hear the evidence of the litigant.

PART VII
PROCEDURE

CHAPTER XVIII

PROCEDURE

- I. Difference between substance and procedure. *Pages 681-5.*
- II. Matters appertaining to procedure. *Pages 685-710.*
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 - (d) Execution. *Page 710.*

I. DIFFERENCE BETWEEN SUBSTANCE AND PROCEDURE

ONE of the eternal verities of every system of private Procedure international law is that a distinction must be made governed exclusively by *lex fori* between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the *lex fori*.¹ In a case where the issue was the liability of the defendant upon a promissory note made in France, Tindal C.J. stated the principle and the distinction that it causes as follows:

‘The distinction between that part of the law of the foreign country where a personal contract is made which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merits of the contract, all that relates *ad litis decisionem*, is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the law of the country where the action is brought.’²

At first sight the principle seems almost self-evident. A Justification of the rule person who resorts to an English court for the purpose of enforcing a claim that arose abroad cannot expect to occupy a different procedural position from that of a domestic litigant.

¹ *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13; *Melan v. The Duke de Fitzjames* (1797), 1 B. & P. 138, 142, *per* Heath J. *diss.*; Story, s. 556; Westlake, s. 341; Dicey, p. 1087; Graveson, p. 386; Foote, p. 542. For the history of the principle see 39 *Michigan Law Review*, 396 et seqq. (E. H. Ailes). On the subject generally see Falconbridge, *Conflict of Laws* (2nd ed.), pp. 301 et seqq., and see articles there cited at p. 301 note (a).

² *Huber v. Steiner*, *supra*, at p. 210.

The department of procedure constitutes perhaps the most technical part of any legal system, and it comprises rules many of which would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines. A person suing in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other suitors here; neither must he be deprived of any advantages which English law may confer upon a litigant in the particular form of action.¹ An English creditor who sues his debtor in Scotland cannot insist upon a trial by jury, nor, in the converse case, can a Scottish creditor suing in England refuse the intervention of a jury, on the ground that in Scotland, where the debt arose, the case would be tried by a judge alone.²

Importance
of dis-
tinguishing
substance
from pro-
cedure

Certain and universal though the principle is, however, its application is frequently one of considerable difficulty, for by what test is a procedural rule to be distinguished from one of substantive law?³ Unless the distinction is made with a sagacious regard to the underlying purpose of private international law, the inevitable result will be to defeat that purpose. So intimate is the connexion between substance and procedure, that to treat an English rule as procedural may defeat the policy which demands the application of a foreign substantive law. A glaring example of this is afforded by the fourth section of the Statute of Frauds which formerly provided that no action should be brought upon certain contracts unless they were evidenced by a note or memorandum signed by the party to be charged or by his agent thereunto lawfully authorized. In Leroux v. Brown:⁴

facts: An oral agreement was made in France by which the defendant, resident in England, agreed to employ the plaintiff, resident in France, for a period that was longer than a year. The contract was valid by French law, which was the proper law, but had it been an English domestic contract it would have been unenforceable under the Statute of Frauds. An action brought in England for its breach failed on the ground that the statute imposes a rule of procedure which is binding on all litigants suing in England.

¹ *De la Vega v. Vianna*, *supra*, at p. 288, *per* Lord Tenterden.

² *Don v. Lippmann*, *supra*, at p. 14, *per* Lord Brougham.

³ See Paton, *Jurisprudence*, pp. 433 et seqq.

⁴ [1852] 12 C.B. 801; and see *Morris v. Baron*, [1918] A.C. 1, 15. The statute now applies only to a contract of guarantee; Law Reform (Enforcement of Contracts) Act, 1954, s. 1.

A moment's reflection will show that this decision, though possibly based upon an intelligible principle of domestic law, is repugnant to the principles upon which English private international law is founded. That law exists to fulfil foreign rights, not to destroy them. The proper law of the contract in *Leroux v. Brown* undoubtedly entitled the plaintiff to recover damages for the breach of the undertaking, and had he obtained judgment in France in an action to which the defendant voluntarily appeared, nothing would have prevented him from succeeding in a suit brought upon the judgment in England. To refuse him a right of action in England on the contract was tantamount to denying that the contract, admittedly governed as to substance by French law, conferred a right upon him. It is a stultification of private international law to refuse recognition to a foreign right substantively valid under its *lex causae*, unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations. That learned judge Willes J. attacked the decision in two later cases, and was evidently of opinion that in the circumstances the statutory rule should not have been treated as procedural.¹

The question remains, then, how the line between substance and procedure is to be drawn for the purposes of private international law. Only the most general definitions of 'the law of procedure' have been given by the English judges. Perhaps the best known is that of Lush L.J.:

How is the distinction to be made?

'The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer; the machinery as distinguished from the product.'²

This substitution of 'mode of proceeding' for 'procedure' does not carry us far. Nor does the definition ensure a just and convenient solution. It implies that since the owner has chosen to fashion his foreign-acquired right into a new form through the instrumentality of English machinery he must rest content

¹ *Williams v. Wheeler* (1860), 8 C.B. (N.S.) 299, 316; *Gibson v. Holland* (1865), L.R. 1 C.P. 1, 8. See Williston on *Contracts*, 1, s. 600; 32 *Yale Law Journal*, 311 (Lorenzen). Rules analogous to that contained in the Statute of Frauds are found on the Continent. For example, by French law a notarial or a written contract is required for a contract concerning an object valued at more than 500 francs; Wolff, pp. 230-1. The Continental view is that this is a substantive rule to be applied only if it is part of the proper law of the contract; *Benton v. Horeau* (Clunet, 1880, p. 480), cited 15 *B.T.B.I.L.* (1934), 29.

² *Poyser v. Minors* (1881), 7 Q.B.D. 329, 333; adopted in *Shoemith v. Lancashire Mental Hospital*, [1938] 3 All E.R. 186.

with the design and movement of that machine. This sounds sensible, but if as in *Leroux v. Brown* the machinery refuses to move, one part of private international law is incontinently nullified by another. Nor shall we arrive at a solution if we change the metaphor and concentrate upon the contrast between right and remedy. They do not always admit of contrast in law. Historically they are inseparably connected. Much of substantive law is secreted in the interstices of procedure,¹ and a great American has said that 'wherever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source'.² Moreover, it is still true that certain rules which on the surface appear merely to affect remedies are in fact rules of substance, not of procedure.³

The truth is, as an American jurist has so convincingly shown, that substance and procedure cannot be relegated to clear-cut categories.⁴ There is no preordained dividing line between the two, having some kind of objective existence discoverable by logic. What is procedural, what substantive, cannot be determined *in vacuo*.⁵ A line between the two must, of course, be drawn, but in deciding where to draw it we must have regard to the relativity of legal terms and must realize the exact purpose for which we are making the distinction. The line should not be drawn in the same place for all purposes.⁶ It should be drawn in the light of the relevant circumstances, one of which is that the purposes of private international law as distinct from municipal law require fulfilment. Thus it is at least arguable that whether the fourth section of the Statute of Frauds is of a procedural or a substantive nature should be decided differently according as a foreign or a purely English transaction is involved. The crux of the matter is—Why is the distinction between substance and procedure made in private international law? The answer presumably is—For the convenience of the court. The court, when seised of a 'conflict of laws' problem, though bound to apply the *lex causae*, cannot be expected to import all the relevant rules of the foreign law. To apply, for instance, the foreign rules concerned with such

No innate
distinction
between
substance
and pro-
cedure

Governing
factor is the
purpose for
which the
distinction
is required

¹ Maine, *Early Law and Custom*, p. 389.

² Holmes, *The Common Law*, p. 253. For a collection of similar statements see 39 *Michigan Law Review*, 401-2, note 36.

³ Salmond, *Jurisprudence* (10th ed.), sec. 175.

⁴ Cook, *Logical and Legal Basis of Conflict of Laws*, chap. vi, pp. 154 et seqq.

⁵ *Ibid.*, p. 189.

⁶ *Ibid.*, *passim*.

matters as service of process, evidence and methods of enforcing judgments would be not only inconvenient but impracticable. Nevertheless, the overriding policy is to apply the foreign substantive law, and if this will be defeated by a slavish adherence to the domestic distinction between substance and procedure, it behoves the court to consider whether in the circumstances such adherence is necessary.

'If we admit', says Cook, 'that the "substantive" shades off by imperceptible degrees into the "procedural", and that the "line" between them does not "exist", to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the *forum* go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?'

One critic has replied, 'Not much farther than we have already gone',² but at least it would be possible to go far enough to avoid such decisions as *Leroux v. Brown*³ and some of those concerned with statutes of limitation.

The principal rules that, rightly or wrongly, have been classified as procedural will now be considered in detail.

II. MATTERS APPERTAINING TO PROCEDURE

(a) *The time within which an action must be brought.*

English law is unfortunately committed to the view that statutes of limitation, if they merely specify a certain time after which rights cannot be enforced by action, affect procedure, not substance. They concern, it is said, not the merits of the cause, but the manner in which the remedy must be pursued. They ordain that procedure is available only when set in motion within a certain fixed time after the cause of action arose. In the result, therefore, any relevant statute of limitation that obtains in the *lex fori* may be pleaded, while a statute of some foreign law, even though it belongs to the proper law of the transaction, must be disregarded. The prevailing view on the Continent is to the opposite effect.⁴

This is another example where English law, through its failure to interpret a foreign rule in its context,⁵ has gone astray.

Suppose, for instance, that an action brought in England upon a

¹ Cook, *Logical and Legal Basis of Conflict of Laws*, p. 166.

² E. H. Ailes, 39 *Michigan Law Review*, 418.

³ *Supra*, p. 682.

⁴ See 28 *Y.L.J.* 492; 31 *Michigan Law Review*, 474; 21 *Can. B.R.* 786.

⁵ *Supra*, p. 55.

⁶ Wolff, p. 232.

German contract is barred by the German statutes but is still maintainable according to English law.

The correct course in such a case is to ascertain whether the foreign statute is classified by German law, which is the proper law of the contract, as substantial or procedural. If in the eyes of German law it affects substance, it should be regarded as operative in England; but if it affects procedure it must stand excluded. To allow the action to proceed merely because it is in time according to the statutes of the forum, which is what the English courts do, is to allow a remedy which is no longer available under the law that governs the substance of the transaction concerned. That law should govern the annihilation of the right of action as well as its creation.

The rules of English private international law upon this matter, however, pay little attention to the proper law of the transaction that is in issue. Thus in a report of a judgment by Roche J. it is said: 'Foreign courts might have decided that the laws of limitation were part of the substantive law, but he was unable to apply them as such'.¹ The result of this attitude is twofold.

English statute exclusively applicable in England Firstly, an English statute of limitation is a good plea to an action brought in England, notwithstanding that the action is still maintainable according to the proper law of the transaction.²

Thus in *British Linen Company v. Drummond*,³ the English period of six years was applied to an action on a Scottish contract, although the time within which the action might have been brought in Scotland was forty years.

Foreign statute not applicable in England Secondly, the extinction of the right of action by the proper law of the transaction is not a bar to an action in England. In other words, if the permissible period is longer in England than in the foreign country the plaintiff is at liberty to sustain his action here.⁴ Moreover, this is so, even though the foreign court has already adjudged the action to be barred in its own country. In *Harris v. Quine*:⁵

Harris v. Quine The plaintiffs, attorneys in the Isle of Man, were employed by the defendant from 1858 to 1 October 1862, in conducting actions

¹ *Société de Prayon v. Koppel*, *The Times* newspaper, 2 Nov. 1933.

² *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Don v. Lippmann* (1837), 5 Cl. & F. 1.

⁴ *Harris v. Quine* (1869), L.R. 4 Q.B. 653; *Huber v. Steiner* (1835), 2 Bing. N.C. 202; *Alliance Bank of Simla v. Carey* (1880), 5 C.P.D. 429.

⁵ *Supra*.

on his behalf in the island. In an action for recovery of fees brought by the plaintiffs in the Manx court on 30 October 1865, judgment was given for the defendant, on the ground that by the Manx statute the suit should have been instituted within three years of the cause of action. To an action brought by the plaintiffs in England for the recovery of the same amount, the defendant pleaded the judgment of the Manx court.

The plea failed and judgment was given for the plaintiffs. Presumably the plea of *res judicata* failed on the ground that there had been no adjudication in the Isle of Man upon the existence of the substantive right.

So far we have dealt only with statutes of limitation strictly so called, i.e. those which merely fix the period within which the remedy must be pursued. If they are of a different nature, that is to say, if they not only bar the remedy but extinguish altogether the claim or cause of action, then English courts are prepared to give effect to the proper law of the transaction. The prevailing opinion is that a statute of this description, if part of the proper law of the transaction, may be successfully pleaded in any other country where the cause of action is put in suit.¹ Thus in *Harris v. Quine*² Blackburn J. said:

Different position of statutes which extinguish the right

'If the plaintiffs could have shown that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter.'

This distinction is analogous to that which obtains in the civil law, namely, between positive or acquisitive prescription (the Roman *usucapio*), which is the acquisition of ownership by long-continued possession, and negative or extinctive prescription, which neither destroys nor transfers to a new owner an existing right, but provides that the right cannot be put in suit after the lapse of a certain period. The English Limitation Act destroys, sometimes the right, sometimes merely the remedy.

A statute which ordains that actual ownership shall be obtained by long-continued possession goes to the substance of a transaction, and must be recognized by a foreign *lex fori*. Though statutes of limitation of this nature generally concern land,³ they may refer to movables.

Extinction of right to property

Thus in *Shelby v. Guy*,⁴ in the Supreme Court of the United States, it appeared that by the law of Virginia five years' bona fide possession of

¹ Story, s. 582.

² (1869), L.R. 4 Q.B. 653.

³ *Beckford v. Wade* (1805), 17 Ves. Jun. 87.

⁴ 11 Wheaton 361.

a slave created a title upon which the possessor could recover in detinue. It was accordingly held that a person who had bought a slave in Virginia from one who had been in possession for longer than five years could successfully set up the title thus acquired under the *lex loci* as a defence to an action brought against him in Tennessee.

The rule of English law until recently was that adverse possession of personal chattels did not extinguish the title of the owner, but merely barred his remedy. The Limitation Act, 1939, however, now provides that where a cause of action in trover or detinue has accrued to a person his title to the chattels shall be extinguished after the lapse of six years from the time of accrual.¹ When the issue concerns an obligation, as distinct from property in the tangible sense,² the question whether a foreign statute must be recognized in an English action depends solely upon whether the statute extinguishes not merely the right of action, but the right itself—whether, in other words, it declares the right to be non-existent. This issue arose in *Huber v. Steiner*,³ where a promissory note had been made in France by the defendant to the order of the plaintiff, both parties at the time being resident and domiciled in that country. To an action brought on the note in England, the defendant pleaded the French law of prescription, which provided that:

Extinction
of obligation

All actions relative to letters of exchange and to bills to order . . . *prescribe themselves* by five years, reckoning from the day of protest or from the last suing out of any judicial process. . . .

Tindal C.J. in delivering judgment said that it was necessary to consider

Judgment
of Tindal
C.J. in
Huber v.
Steiner

‘Whether, by the law of France, the contract made by the defendant in his promissory note is altogether extinguished and made null and void in that country; or whether, under the doctrine of prescription, the contract itself is not annulled and extinguished, but the remedy only barred in the French courts of law.’

In the former case, the French rule would remain operative; in the latter, it would form no bar to an action in the English courts. The learned judge, having examined the wording of the French enactment, came to the clear conclusion that it contemplated only a limitation of the remedy and not an utter avoid-

¹ S. 3 (1), (2).

² Westlake, p. 327, contends that prescription in the strict sense cannot apply to obligations.

³ (1835), 2 Bing. N.C. 203. And see *Société de Prayon v. Koppel*, *The Times* newspaper, 2 Nov. 1933, cited and explained in 15 *B.Y.B.I.L.* (1934) 75.

ance of the contract itself. It is doubtful, however, whether the correct test was applied in the classification of the French rule.¹

(b) *The mode in which an action must be brought.*

Authority is scarcely needed for the proposition that all routine matters arising in the successive stages of litigation must be governed exclusively by English law as being the *lex fori*. It is generally said that these include: service of process;² the form that the action must take, e.g. whether it should be an action at common law or a suit in equity, or whether any special procedure is permissible; the title of the action, e.g. by what persons and against what persons it should be brought; the competency of witnesses and questions as to the admissibility of evidence; the respective functions of judge and jury; the right of appeal, and, according to some writers, the burden of proof.

Mode of
proceedings
governed
by *lex fori*

Of these examples the three matters of burden of proof, evidence, and appropriate parties call for special examination.

A controversial question is whether presumptions and burden of proof are matters that affect procedure or substance.³

Burden of
proof

By English law, for instance, there is a presumption that a wife is entitled to pledge her husband's credit for household necessities which are suitable to his style of living. The burden lies on the husband to rebut the presumption, which he may do in a variety of ways, as, for instance, by proving that at the time of the purchase he was sufficiently supplied with articles of the kind bought. Suppose that by the law of country *X* a husband is liable for household necessities bought by his wife unless he is sufficiently supplied already, but that it lies upon the seller to prove that the supply was insufficient at the time of the contract. Suppose further that a purchase of necessities has been made in *X*, with which country the three parties are connected by nationality, domicile and residence.

If the tradesman sues the husband in England for the price of the goods, is it for him to prove in accordance with the law of *X* that the goods were necessary in the strict sense, or is it for the husband to prove that they were not needed? Upon the ruling given to this problem may depend the result of the case. It is submitted that the law of *X* applies, upon the ground that the facts to be proved and the obstacles to be overcome by a plaintiff before he establishes his cause of action affect

¹ 15 *B.Y.B.I.L.* 67-68; 75-76.

² *Dobson v. Festi, Rasini & Co.*, [1891] 2 Q.B. 92.

³ See Wolff, pp. 234-6.

essentially the substance of his right. It is reasonably clear in the hypothetical case just given that the content of the tradesman's substantive right varies according as it is tested by the law of *X* or by English law. In the one case his right is to recover only if he proves a certain fact, in the other he has an absolute right of recovery unless that fact is disproved by his opponent. It is impossible to describe the exact nature and extent of his right without taking this circumstance into account. To establish his cause of action, which is a matter of substantive law, he must prove that at the time of the contract the husband was insufficiently provided with the class of goods supplied.¹

This view, that the burden of proof is regulated by the *lex causae*, has the support of Uthwatt J. in *In re Cohn*,² but the contrary view was voiced by Langton J. in *The Roberta*.³

Burden of
proof in
contribu-
tory negli-
gence

The question whether a rule distributing the burden of proof affects substance or procedure has frequently arisen in the United States of America upon a plea of contributory negligence. The general rule as to tortious liability recognized by the State courts is that the *lex loci delicti* determines whether a right of action exists. It is that *lex* which constitutes the substantive law. But in some States the burden of proving contributory negligence lies upon the defendant, in others it is for the plaintiff to prove affirmatively that he was personally free from negligence. It may, therefore, become necessary to decide whether such a rule is procedural or not when an action is brought in one State in respect of an injury caused in another. The decisions are not in agreement, but there is respectable authority for the view that the burden of proving contributory negligence is determined by the law of the place where the injury was committed, in other words that the question is one of substantive law.⁴

Evidence a
matter for
lex fori

Every system of law has its own principles for determining the manner in which the truth of facts, acts and documents shall be ascertained, and it is obvious that whether the question

¹ The presumptions in the hypothetical case would seem to be what a distinguished writer has called 'compelling presumptions', 61 *L.Q.R.* 380. Wolff, p. 235, points out that 'those Continental legislators who have made two separate codes, a civil code and a code of civil procedure, have placed all these rules in their civil codes'.

² [1945] 1 Ch. 5.

³ (1937), 58 *LL. L.Rep.* 159.

⁴ See, for example, *Fitzpatrick v. International Railway* (1929), 252 N.Y. 127; Lorenzen, p. 371; dist. *Sampson v. Channell* (1940), 110 F. 754; Cheetham, p. 541; see generally Hancock, *Torts in the Conflict of Laws*, pp. 159 et seq.; Goodrich, pp. 238-9.

at issue is domestic or foreign in origin, those principles must invariably apply. If another system of evidence were admissible it would be equally reasonable to permit another mode of trial.¹

'Whether a witness is competent or not,' said Lord Brougham, 'whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises.'²

*Leroux v. Brown*³ is an outstanding example of the rule that the *lex fori* determines whether written evidence is required.

With regard to the evidence necessary to prove a certain fact, an important distinction that exists where the *causa probanda* is a document must be noted. The interpretation of the document must be distinguished from its proof. The foreign document must be interpreted according to the system of law by which it is governed (e.g. according to the proper law in the case of a written contract), but it must be proved in accordance with the requirements of the *lex fori*. The English court that is seised of the matter must investigate the governing law as a fact and must take such expert evidence as shows what the construction would be in the foreign country, but at that point the reference to the foreign law must stop. What evidence that law admits, what it rejects, is irrelevant.⁴ Thus, for example, the meaning of technical expressions used in a charter-party must be ascertained by reference to the proper law, but the existence of the charter-party itself must be proved in the manner required by English law. Thus in *Brown v. Thornton*:⁵

Distinction
between
interpreta-
tion and
proof of
document

An action was brought in England to recover freight due under a charter-party that had been made in Batavia. It was found that charter-parties were made in Batavia by the instrument being written in the book of a notary, and then signed by the parties. Each party received a copy signed and sealed by the notary and counter-signed by the principal officer of the Government of Java. A charter-party was sufficiently proved in a Javanese court by production of the notary's book, but, since such books were not allowed to be removed from Java, courts in other parts of Dutch dominions admitted the copies as evidence.

The plaintiff was nonsuited owing to his failure to prove the charter-party in the manner required by English law. The original contract contained in the notary's book was not produced. Secondary evidence would have been admissible had

¹ *Yates v. Thompson* (1835), 3 Cl. & F. 544, 587, per Lord Brougham.

² *Bain v. Whitehaven Ry. Co.* (1850), 3 H.L.C. 1, 19. ³ *Supra*, p. 682.

⁴ *Yates v. Thompson*, *supra*, at p. 586, per Lord Brougham.

⁵ (1837), 6 Ad. & E. 185.

it been given in the form either of a copy made by the public officer of a court or of a copy made by some person authorized by each party to give a binding copy, but neither of these ways was available. The decision, however, might have been different had it appeared that the copies were taken at the time when the original contract was made and in the presence of the parties, for in such an event it would have been arguable that the notary was an agent authorized by both parties to give a binding copy.

Evidence Act, 1933 The Crown, however, now has power under the Evidence (Foreign Dominion and Colonial Documents) Act, 1933, to issue Orders in Council providing that entries contained in the public registries of other countries, whether part of the British Commonwealth or not, shall be admissible evidence in English proceedings, and that they shall be proved by means of duly authenticated official certificates. An Order in Council, however, will not be made unless the foreign country in question recognizes the public registers of the United Kingdom and admits proof of the registered contents by means of duly authenticated certificates issued by public officers in the United Kingdom.¹

Interpretation distinguished from evidence Evidence, however, must be distinguished from interpretation. The rule of English law, for instance, that if a contract is written, 'the writing is the grand criterion of what terms are intended to be contractual and what not'² and that therefore oral evidence is inadmissible to add to, vary or contradict the writing, is a rule of evidence properly so called that must be applied in every English action.³ But, despite its deceptive similarity, the rule which admits oral evidence to show that the parties intended to incorporate a certain condition customarily included in a contract of the particular kind is a rule of interpretation that is not necessarily applicable merely because the action is in England. It concerns interpretation, not proof.⁴ Owing to the imperfect manner in which the contract has been drafted, the intention of the parties is not clear and the object of the particular rule is to explain what they meant.⁵

¹ Orders have already been made in respect to Belgium (S.R. & O. 1933, No. 383), France (S.R. & O. 1937, No. 515), and Australia (S.R. & O. 1938, No. 739). See *North v. North* (1936), 52 T.L.R. 380; *Motture v. Motture*, [1955] 1 W.L.R. 1066 and the Practice Note in [1955] 1 W.L.R. 668.

² *Korner v. Witkowitz*, [1950] 2 K.B. 128, 162, per Denning L.J.

³ *Ibid.* at pp. 162-3.

⁴ *Ibid.* at p. 163.

⁵ The different nature of the two rules is illustrated and explained in Stephen, *Digest of the Law of Evidence* (12th ed.), notes xiv and xv to articles 97 and 98.

A distinction must also be made between facts that are relevant and the evidence by which such facts are proved, for the former fall to be decided according to the proper law of the transaction, while the latter is a matter of procedure for the *lex fori*. This was considered in *The Gaetano and Maria*.¹

Distinction
between
proof and
facts to be
proved

An action was brought in England on a bottomry bond given at the Azores by the master of a ship carrying the Italian flag, without any communication with his owners. By Italian law the bond was valid; by English law its validity depended upon proof that at the time it was given the ship was in necessity and that the circumstances were such as to render it impossible for the master to communicate with the cargo-owners. It was accordingly argued that, since proof of necessity is a matter of evidence, the question of the validity of the bond must be determined by English law as being the *lex fori*. The flaw in this argument was exposed by the Court of Appeal.

The sole fact in issue was one of substance, namely whether the master had authority to give a valid bond, a question which fell to be determined by Italian law as being the law of the flag. The equivalent English rule on this question no doubt differed from that obtaining in Italy, but since it affected substance, not procedure, it was not to be invoked merely because the action was in England. The converse position occurred in the American case of *Hoadley v. Northern Transportation Co.*,² where the facts were these:

A contract for the shipment of goods was made in Illinois and the defendants, common carriers, gave the plaintiff shipper a bill of lading which contained a clause exempting the defendants from all liability for loss of property by fire while in transit or in a warehouse. The goods were destroyed at Chicago in the great fire of 1871. By the law of Illinois, and also of Massachusetts where the action was brought, a common carrier was permitted to avoid his liability at common law by a special contract. By the law of Illinois, however, such a contract did not bind a shipper unless he had assented to its terms, and assent was not presumed from mere receipt of the bill of lading but had to be proved by other and additional evidence. By the law of Massachusetts acceptance of the bill of lading was in itself sufficient evidence of assent.

The question in the Massachusetts action was whether this rule of Illinois law applied. Did that rule affect the remedy upon the contract or its validity? It is clear that the fact to be proved, no

¹ (1882), 7 P.D. 137.

² 115 Massachusetts 304; Beale's *Cases on the Conflict of Laws*, i. 571. There is, however, a conflicting decision, *Hartmann v. Louisville & N. Ry. Co.* (1890), 39 Mo. App. 88; see Goodrich, *op. cit.*, p. 238 note.

matter where the action was brought, was whether a special contract had been made. What the Illinois rule ordained was that if action were brought that fact must be proved by certain evidence, just as the Statute of Frauds requires that a contract of guarantee put in suit in England must be proved by written evidence. It was held, therefore, that the rule affected procedure and was of no force in Massachusetts.

Form of proceeding governed by *lex fori* It is not a valid objection to an action instituted in England in the correct form that the form would necessarily have been different had proceedings been instituted in the courts of the proper law of the transaction.¹ The form in which a remedy must be pursued goes to procedure. In effect, differences of form are concerned with the identity of the parties to the action, and in this connexion there are two questions to be considered.

Question who is the correct person to sue generally said to be a matter for *lex fori* The first is, whether the name in which an action may be brought falls to be determined exclusively by the *lex fori*, on the ground that it is a mere matter of procedure. It is a question that arises principally where the plaintiff is not the original owner of the subject-matter of the dispute, but has acquired it derivatively from the original owner, as, for instance, in the case of the assignment of a debt or other *chose in action*. In those cases where English law requires the assignee to sue in the name of the assignor, it has been said,² and indeed on one occasion held,³ that the requirement must be observed in an action in this country, even though it is not necessary by the proper law of the transaction. In the present state of English law this ruling causes no hardship, since, even where the assignment is purely equitable, the plaintiff can overcome the difficulty by joining the assignor as defendant, provided that he still has a *de jure* existence.⁴

But on principle it is doubtful whether every rule that regulates the name in which an action must be brought is merely procedural in character. It would seem to be an unwarranted extension of the province of procedure, at any rate in cases falling within the sphere of private international law, to regard a rule as procedural if the effect is to deprive the plaintiff of a right which he has definitely acquired under the governing legal system. If, for instance, English law still regarded a contractual right as so essentially personal as to be actionable

¹ *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877, 895.

² *Wolff v. Oxholm* (1817), 6 M. & S. 92, 99, *per* Lord Ellenborough.

³ *Jeffery v. McTaggart* (1817), 6 M. & S. 126.

⁴ See the Russian Bank cases, *supra*, pp. 516 et seqq.

only at the suit of the original contracting party, it would surely be the negation of principle, and indeed of justice, to enforce such a rule indiscriminately as being one of procedure, and thus to defeat a plaintiff who had acquired a contractual right derivatively under some legal system which regarded the transaction as valid. To adopt this attitude would be to mistake substance for procedure. There is little authority on the matter, but the early case of *O'Callaghan v. Thomand*¹ at least shows that the English courts have not always adopted this attitude.

The assignee of an Irish judgment brought an action of debt in his own name in England to recover the amount of the judgment. He was entitled so to sue by Irish law.

The argument of counsel for defendant was instructive. Though admitting the general principle that the law of one country would recognize and enforce obligations raised by the law of another country, he contended that the principle applied only to the substance of the contract, and could neither affect the form of enforcing an obligation in another country nor be allowed to contravene the general rule of English law that *choses in action* were unassignable. He therefore argued that no action could be maintained in the present circumstances except in the name of the person who recovered the judgment. The court, however, was unanimous that the rule was matter of substance, not of procedure. The same result was reached in the earlier case of *Innes v. Dunlop*.²

The second question relates to the party sued. To decide whether a foreign rule determining the identity of the party to be sued, or prescribing the order in which parties must be sued, is one of substance or of procedure, it is necessary to classify the exact nature and effect of the rule according to the legal system of which it forms a part.

Foreign
rules de-
termining
party to be
sued

The question is of especial importance in partnership cases. The doctrine, for instance of English law, that any one partner may be sued alone for the totality of the partnership debts is in sharp contrast with the rule obtaining in many other jurisdictions, that a creditor cannot sue an individual partner until he has first sued the partners jointly and the assets of the firm have been exhausted. A rule of this nature, if pleaded as a bar to an English action, must be classified in its foreign context. It must

¹ (1810), 2 Taunt. 82. See also *Trimbey v. Vignier* (1834), 1 Bing. (N.C.) 151, 160; *Alivon v. Furnival* (1834), 1 C.M. & R. 277, 296.

² (1800), 8 T.R. 595. But for a contrary view see Morris (1st ed.), p. 249.

not be dismissed as procedural, if the result will be to impose a liability that does not exist by the proper law of the transaction, but if it merely requires the enforcement in a particular manner of an admitted liability, it must be dismissed as a rule affecting only the mode of process. The principle applied by the courts appears to be as follows:

If the proper law regards the defendants' liability as undoubted, though it makes it a condition precedent to an action that other parties be sued first, this is a rule of procedure that, unless it obtains in England, is ignored in English proceedings. If, on the other hand, the proper law regards the defendant as being under no liability whatever unless other parties are sued first, it imposes a rule of substance that must be observed in English proceedings.¹

In re Doetsch Thus in an action brought against the executors of a deceased member of a Spanish firm, a plea, which averred that according to Spanish law creditors could not institute a suit against the separate estate of a deceased partner until they had had recourse to and had exhausted the property of the firm, was held bad, on the ground that the rule in question determined merely the mode of procedure.²

General Steam Navigation Co. v. Guillou The distinction was neatly raised in the leading case of *General Steam Navigation Co. v. Guillou*,³ where the facts were as follows:

The plaintiffs brought an action in England to recover damages for injury caused to one of their ships by the negligent navigation of a French ship which at the time of the accident was under the direction and management of the defendants' servants. The offending ship belonged to a French company of which the defendant was a shareholder and acting director.

The third plea to the action stated that:

By the law of France the defendant . . . was not . . . responsible for or liable to be sued or impleaded individually, or in his own name or person, in any manner whatsoever, in respect of the said causes of action, . . . but by the law of France the said company alone, by their said style or title, or the master in command for the time being of the said ship, was . . . responsible for, and liable to be sued or impleaded for, the said causes of action.

The one question, therefore, that fell to be decided here was

¹ *General Steam Navigation Co. v. Guillou* (1843), 11 M. & W. 877; *Bank of Australasia v. Harding* (1850), 9 C.B. 661; *Bullock v. Caird* (1875), 10 Q.B. 276; *In re Doetsch*, [1896] 2 Ch. 836. The suggested principle is criticized by Wolff, *op. cit.*, p. 240.

² *In re Doetsch*, *supra*.

³ *Supra*.

whether the French law, as disclosed in the plea, absolved the defendant from all liability in any circumstances, or whether it imposed upon him an undoubted though a joint liability. The court unanimously took this distinction. Parke B., speaking for the four judges, said:¹

'If the defendant was not liable for the acts of that other by that law which is to govern this case, he has a good defence to the action; and, for the defendant, it is contended that the plea means to aver that, by the law of France, he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel and alone liable for the acts of the master, who was their servant and not the servant of the individuals composing that body. . . . On the other hand the plaintiff contends that the plea only means that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the company under the name of their association: and if this be the true construction of the plea, we all concur in the opinion that the plea is bad.'

It is submitted that the plea clearly alleged a denial of liability by French law, but the judges of the Court of Exchequer were equally divided on the question, Lord Abinger and Alderson B. holding that French law merely required the defendant to be sued jointly with his co-owners in the name of the company, while Barons Parke and Gurney considered that according to the plea the defendant incurred no responsibility whatsoever, joint or several, for the acts of the master. This judicial difference of opinion upon the question of fact is of no great moment, for the importance of the decision lies in the clearness with which the general principle is stated.

It has consistently been held that the order in which property in the possession of the court is distributable among creditors must be governed by English law. The priority of creditors in such a case is a procedural matter that is determinable by the *lex fori*.² It forms no part of the transaction under which a creditor has acquired his right. It is extrinsic, and comprises in effect a privilege dependent upon the law of the country where the remedy is sought.³ Thus priorities of creditors claiming in

Priorities a matter for the *lex fori*

¹ At p. 895.

² *Pardo v. Bingham* (1888), L.R. 6 Eq. 485; *Ex parte Melbourn* (1870), L.R. 6 Ch. 64; *The Colorado*, [1923] P. 102; dist. priority of assignees of a *chose in action*, *supra*, p. 497.

³ *Harrison v. Sterry* (1809), 5 Cranch. 289, 298, *per* Marshall C.J.; approved in *The Colorado*, *supra*, at p. 107.

bankruptcy or on an intestacy are governed exclusively by the *lex fori*. It is the same in the case of liens. Where, for instance, two or more persons prosecute claims against a ship that has been arrested in England, the order in which they are entitled to be paid is governed exclusively by English law.¹

Distinction
between
question of
substance
and of
priorities

In the case of a right *in rem* such as a lien, however, this principle must not be allowed to obscure the rule that the substantive right of the creditor depends upon its proper law. The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature. When the nature of the right is thus ascertained the principle of procedure then comes into play and ordains that the order of payment prescribed by English law for a right of that particular kind shall govern.

The dis-
tinction
not consis-
tently
observed

It would seem, however, that the courts have not consistently observed this distinction in the case of maritime liens.² A relevant case is *The Tagus*,³ where the correct ranking of mortgagees and of the master of an Argentine ship was disputed.

The master claimed a lien for wages earned and disbursements expended in the course of several recent voyages. His right to a lien for these sums was restricted by Argentine law to the last voyage, but by English law it extended to all voyages made under his captaincy.

The preliminary problem, therefore, was to ascertain the extent of the master's right. What was his substantive right? Had he a valid lien in respect of all wages and disbursements, or only in respect of those connected with the last voyage? The remedial rule of the English *lex fori* was incapable of application until this question of the extent of his right was determined. It seems clear on principle that the matter should have been determined by the law of Argentina, to which country the ship belonged. The court, however, chose to regard the question as purely remedial, and held in accordance with English law that the master was entitled in priority to the mortgagees to the whole of his wages and disbursements. An opposite decision was given in the later case of *The Colorado*,⁴ where, curiously enough, the court professed to follow *The Tagus*.

¹ *The Milford* (1858), Swa. 362, 366; *The Tagus*, [1903] P. 44; *American Surety Co. v. Wrightson* (1910), 16 Com. Cas. 37; *The Colorado*, [1923] P. 102.

² See particularly 57 L.Q.R. 409, 413-14 (Griffith Price).

³ [1903] P. 44.

⁴ [1923] P. 102.

The two claimants to a ship were *A*, who held a French mortgage, *The Colorado* and *B*, who had executed necessary repairs to her at Cardiff. The transaction under which *A* claimed did not constitute a mortgage as understood by English law, but its effect by French law was to give the mortgagee a right equivalent in nature and extent to the maritime lien as recognized in England. With regard to priorities the English rule is that the claim of a necessities man is postponed to that of a lienor, while by French law the claim of a mortgagee is postponed to that of a necessities man.

On these facts it was accordingly held by the Court of Appeal that *A* was entitled to rank first. French law determined the substance of *A*'s right, English law determined whether a right of that nature ranked before or after an opposing claim.

The later case of *The Zigurds*,¹ however, where various claimants against a Latvian ship, including an English mortgagee and English necessities men, prosecuted their claims in England, must be distinguished.

German necessities men had supplied coals to the ship in a German port, and according to German law, if the ship were under arrest in Germany, they had rights analogous to those given by a maritime lien. They contended, therefore, that, since the nature of a lienor's claim is higher than that of an English necessities man, they were entitled to priority over other claimants who had supplied goods to the vessel in England.

It was held that this contention must fail. No one denied that the claimants were ordinary necessities men, a type of creditor whose legal position is well known to English law. The evidence did not show that they constituted a higher class according to German law, but merely that if the ship was arrested by the German court they would enjoy priority over other creditors in the administration of the various claims. Once they had been definitely assigned to an ascertained class of creditor, it followed that the ranking of their claim must be determined by English law as being the *lex fori*.

(c) *The nature and extent of the remedy.*

It is obvious that a plaintiff who seeks to enforce a foreign claim in England can demand only those remedies recognized by English law, and cannot demand even them unless they harmonize with the right according to its nature and extent as fixed by the foreign law. 'Put in another way', to quote Lord

Remedies available in forum must harmonize with right put in suit

¹ [1932] P. 113.

Parker C.J. in *Phrantzes v. Argenti*,¹ 'if the machinery by way of remedies here is so different from that in Greece as to make the right sought to be enforced a different right, that right would not, in my judgment, be enforced in this country.' The position is well illustrated by an American case, where:

A widow brought an action in Texas to recover compensation for the death of her husband which had been wrongfully caused by the defendants in Mexico. By Mexican law the only relief possible was a decree of periodical payments liable to be increased or decreased according to future circumstances; by the law of Texas the only relief possible was the final award of a lump sum.²

It was held that the Texas court could neither make an award in the Mexican sense, since its procedure was not designed to such an end, nor could it award a lump sum, since this would be to alter the extent of the substantive right.

Phrantzes v. Argenti An English illustration is afforded by *Phrantzes v. Argenti* which was concerned with the Greek law relating to the obligation of a man to provide a dowry for his son-in-law. By that law, a father is obliged to establish a dowry for his daughter on her marriage, the amount of which depends *inter alia* upon his fortune, the number of his children and the social position of himself and his son-in-law. If a father fails to fulfil this obligation, his daughter, and she alone, has a cause of action to compel him to enter into a dowry contract not with herself, but with her husband. If the father is abroad, he may be directed by the Greek court to conclude the contract wherever he may happen to be, in the presence either of a public notary or the Greek consul.

It was against this background that Mrs. Phrantzes brought an action in England against her father, claiming a declaration that she was entitled to be provided with a dowry and petitioning that the amount properly due to her should be assessed.

¹ [1960] 2 Q.B. 19, at pp. 35-36.

² *Slater v. Mexican Nat. Ry. Co.* (1904), 194 U.S. 120; Lorenzen, p. 392. But see Schmithoff, *English Conflict of Laws*, p. 355, who cites *Baschet v. London Illustrated Standard* (1900), 69 L.J. (Ch.) 35. In that case an action was brought for an infringement of copyright that had been acquired in France. Kekewich J. granted an injunction, though no such remedy was known to French law. It is submitted that this decision does not conflict with the statement in the text that the English remedy must harmonize with the right as recognized by the *lex causae*. The judge was required by the International Copyright Act to protect a right that had been acquired under French law. He, therefore, was justified in affording to the plaintiff the English form of protection.

All parties were Greek nationals, and it was assumed that the father was domiciled in Greece.

Lord Parker was satisfied that the obligation of a man to establish a dowry in favour of his son-in-law is one that on general principles is enforceable in England. It cannot be excluded on the ground that the right of the beneficiary is unknown to English law.¹ Nevertheless, he held that for at least two reasons the action must fail.

Firstly, there was no remedy at common law appropriate to enforce the exact right vested in the plaintiff by Greek law, namely, 'a right to obtain an order condemning someone to enter into a contract in a particular form with a person not even a party to the proceedings'.²

Secondly, the daughter did not come to the English court possessed of a right to a definite sum of money. What she was entitled to was such sum as, failing agreement, a court in its discretion might assess, and this assessment depended upon a wide variety of factors such as the social position of the parties in a Greek environment. 'All these inquiries and decisions', said Lord Parker, 'are essentially matters for the domestic courts, and matters largely for the discretion of those courts and not our courts.'³

It is established that a claim to set-off affects procedure, not substance, since the issue that it raises is whether the relief claimed by the defendant shall be granted in the plaintiff's action or whether it is obtainable only by a counter-action.⁴ If the court, in accordance with its own procedural code, refuses the privilege of set-off, it makes no attack on the substance of the defendant's claim, but, without adjudging the merits of the claim, merely rules that it must be put in suit in separate proceedings.⁵

The subject of damages raises a problem of some difficulty in private international law, not because the principles are obscure but because the English authorities are scanty. Before the law can be stated, however, it is necessary to sketch in outline the internal law of England upon this matter.

¹ Distinguishing in this respect such decisions as *In re Macartney*, [1921] 1 Ch. 522, *supra*, p. 673; and *De Brimont v. Penniman* (1873), 10 Blatch. 436, where a New York court refused to enforce the right, recognized by French law, of a father to support his son-in-law.

² [1960] 2 Q.B. 19, at p. 35.

³ *Ibid.*

⁴ *Meyer v. Dresser* (1864), 16 C.B. (N.S.) 646.

⁵ But see Wolff, pp. 233-4, where it is shown that under Continental laws set-off is extra-judicial and is regarded as a matter of substance.

Set-off a matter for *lex fori*

Damages

Rules of
internal
English law

This branch of English law is not remarkable for the clear and simple manner in which it has been treated either by judges or jurists. At first sight it appears to abound in inconsistent and irreconcilable statements. In *Robinson v. Harman*,¹ for instance, which was an action for breach of contract, Parke B. stated a proposition that has often been quoted with approval:

'The rule of the common law is, that when a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.'²

Alderson B. agreed, saying that when a person breaks a contract 'he must pay the whole damage sustained'. Six years later, in the leading case of *Hadley v. Baxendale*,³ Alderson B., in delivering the judgment of a court of which Parke B. was again a member, stated another well-known and frequently quoted rule:

'When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.'

Superficially these two statements are flatly contradictory. The first entitles the innocent party to recover the whole damage sustained, the second forbids him to recover for any loss that was neither foreseen nor contemplated by both parties at the time of the contract. It certainly cannot be contended that the rule as laid down by Parke B. in *Robinson v. Harman* must be taken subject to considerable limitations in practice in view of the rule in *Hadley v. Baxendale*, for it is perfectly obvious that *if the two rules were intended to regulate the same matter*, the second would destroy, not merely limit, the first. In *Hadley v. Baxendale* the failure of the defendant to deliver the shaft in accordance with the contract was the direct cause of the stoppage of the plaintiff's mill for an excessive length of time, and if the rule in *Robinson v. Harman* had been binding the plaintiff ought to have received compensation for the whole period during which his mill was idle, since otherwise he would not have been in the same position as if the contract had been performed.

¹ (1848), 1 Ex. 850.

² To the same effect see *Williams v. Agius Ltd.*, [1914] A.C. 510, 522.

³ (1854), 9 Ex. 340.

Two further statements may be quoted with regard to the relation between contracts and torts:

'The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts': *per* Bowen L.J.¹

'Generally, however, it is clear on the authorities that the measure of damages . . . is the same in tort and breach of contract': *per* Scrutton L.J.²

This application of the same rule to contracts and to torts appears at first sight to create a difficulty. *Hadley v. Baxendale* affirms that in contract only such damages are recoverable as follow naturally, i.e. in the ordinary course of things, from the breach; on the other hand, *In re Polemis & Furness Withy & Co.*³ affirms with equal emphasis that in torts the whole of the direct damage is recoverable, whether it follows naturally and in the ordinary course of things from the wrong or not.

What then is the explanation of these apparent inconsistencies? It is impossible to believe that Barons Parke and Alderson in *Hadley v. Baxendale* intended to jettison or even to qualify a rule which had appeared to them so obvious and elementary only six years earlier; equally impossible is it to believe that Scrutton L.J., with whom Bankes L.J. and several other judges have agreed, spoke without circumspection when he enunciated a common proposition for contracts and torts. It is submitted, however, that there is in fact no conflict between the statements quoted above, and that the rule in *Robinson v. Harman* is subject to no limitations whatsoever, whether in practice or in theory. The truth would appear to be that judicial pronouncements and the statements in textbooks are unintelligible unless two entirely different questions are segregated. In brief, remoteness of liability or remoteness of damage must be distinguished from measure of damages. The rules relating to remoteness indicate what kind of loss actually resulting from the commission of a tort or from a breach of contract is actionable; the rules for the measure of damages show the method by which compensation for an actionable loss is calculated. Damage may be, but damages can never be, too remote. In tort the rule of remoteness established by the *Polemis Case* is that a tortfeasor is responsible for all the direct consequences of his wrongful act, even though

Distinction
between
remoteness
of liability
and
measure of
damages

¹ *Cobb v. G.W.R.*, [1893] 1 Q.B. 459, 464.

² *The Edison*, [1932] P. 52, 61.

³ [1921] 3 K.B. 560.

they could not reasonably have been anticipated. The analogous rule in contracts, however, is different. The breach of a contract, like the commission of a tort, causes material loss, and it is that loss to which the rule in *Hadley v. Baxendale* applies. In other words, it is impossible to claim monetary compensation in respect even of an admitted loss unless it arose naturally and in the ordinary course of things from the breach of contract. But the rule that regulates the measure of damages is the same for contracts as it is for torts. It requires *restitutio in integrum*. In torts compensation must be paid for the whole of the direct loss; in contracts, as *Robinson v. Harman* insists, compensation must be paid for the whole of the natural or foreseeable loss.

Rules of private international law Alive to the distinction between remoteness of liability and measure of damages we can now attempt to state the relevant principles of private international law.

Proper law of obligation governs remoteness of liability There can be no doubt, at least on principle, that remoteness of liability must be governed by the proper law of the obligation that rests upon the defendant. Not only the existence, but also the extent, of an obligation, whether it springs from a breach of contract or the commission of a wrong, must be determined by the system of law from which it derives its source.¹ The proper law admittedly determines the nature and content of the right created by a contract, and it is clear that the kind of loss for which damages are recoverable upon breach forms part of that content. Both the nature and the content of a contractual right depend in part upon the question whether certain consequential loss that may ensue if the contract is unperformed will be too remote in the eye of the law. If the proper law determines what constitutes a breach, it is also entitled to determine the consequences of a breach.

Suppose, for the sake of argument, that by French law a purchaser who sues a seller for non-delivery of the goods is entitled to recover for the loss that he has suffered through failure to carry out any sub-contracts that he may have made.

A purchaser under a French contract for the sale of goods acquires, on this hypothesis, a right of a perfectly definite

¹ *Slater v. Mexican National Ry. Co.* (1904), 194 U.S. 120; Lorenzen, p. 392. Wolff, pp. 242-4, agrees and gives several pertinent examples of what falls under the head of remoteness of damage. But in *Kohnke v. Karger*, [1951] 2 K.B. 670, 677, Lynskey J. said: 'The principles on which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts.' On the facts the reference was to remoteness of liability.

REMOTENESS OF LIABILITY



extent, and the principles of private international law require that his position in this respect shall be neither improved nor prejudiced by the fact that he happens to bring his action in England. If the court applies the rule of internal English law, that compensation cannot be recovered for sub-contract losses, the result is to diminish the content of the right as fixed by the governing law.¹ Of course, an exception must be made when the type of loss for which recovery may be had in the foreign country is contrary to the distinctive policy of the *lex fori*.

In *D'Almeida Araujo Lda. v. Sir Frederick Becker & Co. Ltd.*,² a case of breach of contract, Pilcher J. based his decision upon this distinction between remoteness of liability and measure of damages.³ The facts were these:

Remote-
ness of
liability in
contract
cases

By a contract, made on March 20 and governed as to substantial validity by Portuguese law, the plaintiffs, merchants in Lisbon, agreed to sell 500 tons of palm oil to the defendants, a British company carrying on business in London.

With a view to the fulfilment of their undertaking, the plaintiffs agreed to buy 500 tons of palm oil from one Mourao, a Portuguese dealer. This contract provided that in the event of its breach, the party in default should indemnify the other to the extent of 5% of the total value of the contract, a sum which in fact amounted to the equivalent of £3,500. The plaintiffs were forced into the payment of this sum, since the defendants broke the contract of March 20.

In the present action, the plaintiffs claimed to recover by way of damages the £3,500 which they had been obliged to pay under the indemnity. It was admitted that according to English law the loss suffered by reason of this payment would found no claim to damages, since it was not the kind of loss that ensued in the usual course of things from such a breach of contract. The learned judge, however, held that English law was irrelevant. He said:

‘I conclude that the question whether the plaintiffs are entitled to claim from the defendants the £3,500 which they have paid to Mourao, depends on whether such damage is or is not too remote. In my view the question here is one of remoteness, and therefore falls to be determined in accordance with Portuguese law.’³

It is also established that whether interest is payable upon a contractual debt, and if so, at what rate, is a matter to be governed

Question of
interest
one of
substance

¹ For further examples see Martin Wolff, pp. 244-6.

² [1953] 2 Q.B. 329.

³ *Ibid.* at p. 338.

by the proper law.¹ The question often arises on the dishonour of a bill of exchange. Here the general rule at common law is that whether interest is recoverable on dishonour depends upon the proper law of the contract under which the defendant rendered himself liable.²

'So,' says Story,³ if a bill of exchange be made in one State and indorsed in another State, and again indorsed by a second indorser in a third State, the rate of damages upon the dishonour of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or by indorsing the bill.'

In the case, however, of a bill which is dishonoured abroad, the Bills of Exchange Act, 1882, has now provided that in lieu of normal damages the holder may recover from the drawer or indorser, and a drawer or indorser having been compelled to pay may recover from any party liable to him the amount of re-exchange, with interest thereon until payment.⁴

Remote-
ness of
liability in
tort cases

It follows from the *D'Almeida Case* that remoteness of liability in tort is a matter of substance to be governed, presumably, by the *lex loci delicti*. To rule otherwise would, indeed, permit a plaintiff to exact compensation for what was no ground of liability in the *locus delicti*. The kind of loss meriting reparation would vary with the forum.⁵ Thus compensation for the loss of a wife's companionship and services, though not admissible in the country where she had been injured by the defendant's negligence, would be recoverable were the husband to sue in England.⁶ That such a question is not one of procedure was directly affirmed by the Court of Session in *Naftalin v. L.M.S.*,⁷ where, as we have seen,⁸ a plaintiff was not allowed in a

¹ *Arnott v. Redfern* (1825), 2 C. & P. 88, where the proper law of a contract made in London to be performed in Scotland was held to be English law, *sed quaere*; *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121, 140, *per* Lord Cottenham; Dicey, p. 708.

² *Allen v. Kemble* (1848), 6 Moo. P.C.C. 314; *Gibbs v. Fremont* (1853), 9 Ex. 25. ³ S. 307.

⁴ Bills of Exchange Act, 1882, s. 57 (2). This means in the case, for instance, of a bill payable in Paris as much English money as will buy in France at the rate of exchange on the day of dishonour the number of francs for which the bill is drawn, plus the interest and necessary expenses. See the explanation in Byles, *Bill of Exchange*, note to s. 57 (2).

⁵ 22 *Can. B.R.* 851. See the very strong statement of Duff C.J. in the Canadian case of *Livesley v. Horst*, [1924] S.C.R. 605, cited Hancock, *Torts in the Conflict of Laws*, p. 123.

⁶ Cp. the Canadian case of *Lester v. McNulty*, [1944] S.C.R. 317.

⁷ [1933] S.C. 259; followed in *M'Elroy v. M'Allister*, [1949] S.C. 110.

⁸ *Supra*, p. 286, note 9.

Scottish action to recover damages by way of *solatium* in respect of an injury negligently caused to his son in England. Such damages are recoverable by Scottish, but not by English, law. Authority so direct as this in a case of tort is not to be found in England. But in *Ekins v. East India Co.*¹ the plaintiff, who brought trover for a ship which had been converted in the East Indies, was allowed interest on the value of the ship at the rate prevailing in that country. Again, it was held in *Cope v. Doherry*² that a limitation put by the Merchant Shipping Act, 1854, upon what was recoverable in respect of a collision at sea affected the substance of liability, not procedure. The matter is confused owing to the peculiar English doctrine that for a tort to be actionable at all in this country it must contain two ingredients, namely unjustifiability by the *lex loci delicti* and actionability by the *lex fori*.³ It might, therefore, be argued that since the *lex fori* is of equal importance with the *lex loci* in determining the primary question of liability, it has an equal claim to be heard on the question whether recovery may be had for a particular item of damage. Despite the case of *Machado v. Fontes*,⁴ however, the truth would appear to be that a person injured by a wrong abroad cannot recover compensation in England unless compensation is recoverable according to the *lex loci delicti*.⁵

The next question is—By what law is the measure of damages governed? Those textbook writers who deal with the matter affirm in terms that it is governed by the proper law of the obligation, but when their language is analysed it will generally be found that they have in mind what we have called remoteness of liability.⁶ A rule as to the measure of damages in the narrow sense is a mere rule of calculation which operates only after the injury or loss in question has been found to be free from the vice of remoteness. Its function is to quantify in terms of money the sum payable by the defendant in respect of the injury, whether it be a tort or breach of contract, for which his liability has already been determined by the proper law. A plaintiff who seeks to recover compensation in England in respect of an obligation that is governed as to substance by a

Measure of
damages

¹ (1717), 1 P. Wms. 395, and see Wharton, s. 478 c.

² (1858), 2 De G. & J. 614, 626; see also in the court below, 4 K. & J. 367,

³ *Supra*, pp. 280 et seqq.

384.

⁴ [1897] 2 Q.B. 231; *supra*, p. 286.

⁵ *Supra*, p. 287.

⁶ See, for example, Beale on the *Conflict of Laws*, s. 412. 1; Wharton, ss. 427 Q. 478 c.; Goodrich on the *Conflict of Laws*, pp. 254-6.

foreign law has already acquired a right the nature and extent of which have been finally determined. His object is that his right as established shall be converted by the English court into a right to receive a definite sum of money. He is entitled to be paid in full for the injury suffered and he takes advantage of the English process and machinery in order to exact this payment.

Lex fori
governs

It would seem, therefore, that all questions that arise in the course of this quantification of the amount payable should be governed by English law as being the *lex fori*. If, for instance, the defendant pleads a tender of the amount due, he must prove that the tender is in accordance with English law, for if the task of the court is to fix the amount payable it must also be competent to decide whether in its view payment has in effect been already made.¹

Conversion
of foreign
into
English
currency

Again, the view taken in England, though not shared by several foreign countries,² is that an English court cannot order payment except in English currency. 'Whatever sum is ordered to be paid, whether for principal, interest or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution.'³ If an action is brought in England to recover a debt payable in foreign currency or to recover damages for the breach of a foreign contract, or for a foreign tort where the damages are fixed,⁴ the amount of the English judgment must be based on the quantity of English sterling that would be required to purchase in England at the ruling rate of exchange the amount of the foreign currency due.⁵ There was formerly a controversy whether the rate of exchange prevailing at the date of the wrong or at the date of judgment must be followed in making this conversion from foreign to English currency.⁶ The date chosen may be of great importance to the parties in view of the violent fluctuations of the rate of exchange that not infrequently occur in the modern world. It is now settled that the relevant date is the date of the wrong.⁷ The extent of the loss for which the

¹ *The Baarn*, [1933] P. 251.

² Mann, *The Legal Aspect of Money*, pp. 307 et seqq.

³ *Manners v. Pearson & Son*, [1898] 1 Ch. 581, 587, per Lindley M.R.

⁴ *Celia (s.s.) v. s.s. Volturmo*, [1921] 2 A.C. 544.

⁵ *Manners v. Pearson & Son*, *supra*, at p. 593, per Vaughan Williams L.J.

⁶ For a discussion of the matter see Mann, *The Legal Aspect of Money*, pp. 288 et seqq.

⁷ *In re United Railways of Havana and Regla Warehouses Ltd.*, [1960] 2 W.L.R. 969.

plaintiff is entitled to compensation falls to be determined at the date when it was suffered, not at the date when the judgment happens to be delivered.

'If the date taken be that not of the tort but of the judgment, it is giving the plaintiff not damages for the tort, but damages also for the postponement of the payment of those damages until the date of the judgment. If such later damages can be recovered, as under circumstances they may be if the defendant improperly postpones payment, they would be recovered in the form of interest. They would be damages not for the original tort, but for another and a subsequent wrongful act.'¹

This rule applies not only to an action for tort but also to an action for breach of contract,² or for the recovery of a liquidated debt³ or for an account,⁴ or for the non-payment of a promissory note or a bill of exchange.⁵

There are, however, two cases in which it is provided by statute that the conversion into pounds sterling shall be made according to the rate of exchange prevailing at the time of judgment. First, where damages are awarded against an international carrier by aircraft;⁶ secondly, where a foreign judgment expressed in foreign currency is registered in England under the Foreign Judgments (Reciprocal Enforcement) Act, 1933.⁷ This last rule was applied in an action brought in England to recover the damages awarded for breach of contract by an American judgment that was not registrable under the Act of 1933. 'The American judgment', remarked the learned judge, 'is the immediate source from which the defendants' liability flows in the present action, and no earlier date can be called into consideration.'⁸

¹ *Celia (s.s.) v. s.s. Volturno*, [1921] 2 A.C. 544, 563-4 per Lord Wrenbury.

² *Madeleine Vionnet v. Wills*, [1940] 1 K.B. 72; *Di Ferdinando v. Simon Smits & Co.*, [1920] 3 K.B. 409.

³ *Société des Hôtels du Touquet-Paris-Plage v. Cumming*, [1921] 3 K.B. 459; *Graumann v. Treitel*, [1940] 2 All E.R. 188. *In re Russian Commercial and Industrial Bank*, [1955] Ch. 148, explaining *Cummings v. London Bullion Co. Ltd.*, [1952] 1 K.B. 327.

⁴ *Manners v. Pearson*, [1898] 1 Ch. 581.

⁵ *Salim Nasrallah Khoury v. Khayat*, [1943] A.C. 507.

⁶ Carriage by Air Act, 1932, s. 1 (5).

⁷ S. 2 (3). For the main provisions see *supra*, pp. 635-8.

⁸ *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, [1952] 2 Q.B. 439, 444. It follows that since the plaintiff's original cause of action does not merge in the foreign judgment (*supra*, pp. 630-1) he may sue in England for breach of contract, in which case the date of conversion will be the date of the breach.

(d) *Execution.*

Lex fori
governs
exclusively

Judgments and the execution of judgments, being integral parts of the process which the plaintiff has elected to adopt, are necessarily subject to the *lex fori*. The particular mode of execution admitted by that law, whether more or less favourable to the plaintiff than that recognized by the proper law of the transaction, has exclusive application. This principle covers such matters as whether the judgment may be satisfied out of land or goods; whether debts in the hands of third parties can be attached by garnishment; whether a receiver may be appointed; whether a writ *ne exeat regno* is procurable; or whether personal constraint is permissible.

Thus, where a Portuguese, who had been arrested in the course of English proceedings for non-payment of a debt which was due to a Spaniard under a Portuguese contract, applied to be discharged from custody, on the ground that he was not liable to arrest by the proper law of the contract, the application was refused.¹

¹ *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; to the same effect *Brettilot v. Sandos* (1837), 4 Scott 201. The earlier cases of *Talleyrand v. Boulanger* (1797), 3 Ves. 447, and *Melan v. Fitzjames* (1797), 1 Bos. & Pul. 138, are overruled.

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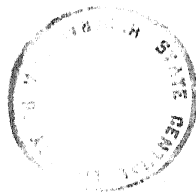
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